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In The

Supreme Court of the United States

October Term, 1990

COMMISSIONER OF REVENUE SERVICES
OF THE STATE OF CONNECTICUT,

Petitioner,

v.

SFA FOLIO COLLECTIONS, INC.,

Respondent

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF CONNECTICUT

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QUESTION PRESENTED

Whether the systematic and continuous solicitation and exploitation of the Connecticut consumer market by the Respondent out-of-state mail order company constitutes sufficient nexus for purposes of the Due Process and Commerce Clauses to require the Respondent to collect use taxes from Connecticut customers on goods sold for use within the state.

TABLE OF CONTENTS

PAGE

QUESTION PRESENTED i

TABLE OF AUTHORITIES iii

OPINIONS BELOW 1

JURISDICTION 2

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED 2

STATEMENT OF THE CASE 2

REASONS FOR GRANTING THE WRIT 6

THE ECONOMIC AND TECHNOLOGICAL DEVELOPMENTS IN THE MAIL ORDER BUSINESS SINCE THE DECIDING OF *NATIONAL BELLAS HESS V. DEPARTMENT OF REVENUE* IN 1967 WARRANT A RECONSIDERATION OF ITS HOLDING IN AN AREA OF TAX LAW WHICH IS OF VITAL IMPORTANCE, NOT ONLY TO CONNECTICUT BUT TO ALL STATES WITH A SALES AND USE TAX 6

CONCLUSION 14

APPENDIX A1

TABLE OF AUTHORITIES

CASES — PAGE

Asahi Metal Industry Co., Ltd. v. Superior Court of California, 480 U.S. 102 (1987) 8

Bloomingdale's By Mail, Ltd. v. Commonwealth Department of Revenue, 130 Pa. Commw. 190, 567 A.2d 773 (1989) . . . 12

Bloomingdale's By Mail, Ltd. v. Huddleston, No. 89-3017-II (Ch. Tenn. March 8, 1991) 12

Burger King Corp. v. Rudzewicz, 471 U.S. 462 (1985) 8

Cally Curtis Co. v. John G. Groppo Commissioner of Revenue Services, 214 Conn. 292, 572 A.2d 302 (1990), *cert. denied,* ____ U.S. ____, 111 S.Ct. 77 (1990) 6

Complete Auto Transit, Inc. v. Brady, 430 U.S. 247 (1978) 13

Keeton v. Hustler Magazine, Inc., 465 U.S. 770 (1984) 8

Kimberly-Clark Corp. v. Dubno, Commissioner of Revenue Services, 204 Conn. 137, 527 A.2d 679 (1987) 6

L.L. Bean, Inc. v. Commonwealth Department of Revenue, 101 Pa. Commw. 435, 516 A.2d 820 (1986) 12

National Bellas Hess v. Department of Revenue, 386 U.S. 753 (1967) . . . . . *passim*

National Geographic Society v. California Board of Equalization, 430 U.S. 551 (1977) 11

Nelson v. Montgomery Ward and Company, Inc., 312 U.S. 373 (1941) 10

Nelson v. Sears, Roebuck Co., 312 U.S. 359 (1941) 10

North Dakota v. Quill, Inc., No. 41677 (Dist. Ct. N.D. May 15, 1990) 12

TABLE OF AUTHORITIES – Continued

CASES — PAGE

Railway Express Agency v. Virginia, 358 U.S. 434, 441 (1959) 12

Scripto, Inc. v. Carson, 362 U.S. 207 (1960) 9

SFA Folio Collections, Inc. v. Bannon, Commissioner of Revenue Services, 217 Conn. 220, 585 A.2d 666 (1991) 1

SFA Folio Collections, Inc. v. Huddleston, No. 89-3015-III (Ch. Tenn. March 11, 1991) 7, 12

Spector Motor Service v. O'Connor, 340 U.S. 508 (1951) 12

Tyler Pipe Industries, Inc. v. Washington Department of Revenue, 107 S.Ct. 2810 (1987) 9

CONSTITUTIONAL PROVISIONS AND STATUTES

U.S. Const. Art. I, § 8 . . . . . *passim*

U.S. Const. Amend. XIV § 1 . . . . . *passim*

Conn. Gen. Stat. § 12-422 6

OTHER AUTHORITIES

Advisory Committee on Intergovernmental Relations, *State and Local Taxation of Out-of-State Mail Order Sales* (April 1986) 10

P. Hartman, *Collection of the Use Tax on Out-of-State Mail-Order Sales*, 39 Vand. L. Rev. 993 (1986) 11

S. McCray, *Overturning Bellas Hess: Due Process Considerations*, 1985 B.Y.U. L. Rev. 265 . . . . . 9n, 10

M. Scroge, *Inside the Leading Mail Order Houses* (1989) 11

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SFA FOLIO COLLECTIONS, INC.,

Respondent

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF CONNECTICUT

The petitioner, Commissioner of Revenue Services of the State of Connecticut, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the Supreme Court of the State of Connecticut entered on January 22, 1991.

OPINIONS BELOW

The opinion of the Supreme Court of the State of Connecticut is reported at 217 Conn. 220, ____ A.2d ____ (1991), and is reprinted in the appendix hereto, p. A1.

The Memorandum of Decision of the Superior Court of the State of Connecticut was issued on April 20, 1990, and has not been reported. It is reprinted in the appendix hereto, p. A21.

JURISDICTION

The decision of the Supreme Court of Connecticut, affirming the judgment of the Superior Court of Connecticut, was entered January 22, 1991. This petition is filed within 90 days of this judgment, as allowed by 28 U.S.C. § 2101(C) and U.S. Supreme Court Rule 13.1.

The jurisdiction of this Court to review the judgment of the Supreme Court of the State of Connecticut is invoked under 28 U.S.C. § 1257.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the following constitutional and statutory provisions: U.S. Const. Art. I, § 8; U.S. Const. Amend. XIV, § 1; and Conn. Gen. Stat. § 12-422.

The text of said provisions is reproduced in the appendix in accordance with U.S. Supreme Court Rule 14.1(f).

STATEMENT OF THE CASE

Petitioner, the Commissioner of Revenue Services of Connecticut, has sought to impose use tax on an out-of-state mail order seller, SFA Folio Inc., for mail order sales to Connecticut residents.

The parties (hereinafter "the Commissioner" and "Folio") stipulated to all of the facts relating to these proceedings. There was no testimony except the deposition of Joan F. Krey, an officer of Folio and vice president, general counsel, and secretary of Saks & Company, Folio's parent corporation, which was submitted as an exhibit by both parties.

Based upon this deposition and the Stipulation of Facts, App. p. A29, and exhibits thereto, the factual background can be summarized as follows.

Because of the large-scale, systematic, continuous solicitation and exploitation of the Connecticut consumer market by Folio, the Connecticut Commissioner of Revenue Services required Folio to collect use taxes from its Connecticut customers. There is no dispute between the parties that purchases and subsequent use of the property is subject to tax. The only question is whether Folio must collect it.

Folio is a corporation organized and existing under the laws of the State of New York with its principal place of business in Yonkers, New York. It is a wholly-owned subsidiary of Saks & Company ("Saks"), which is a New York corporation with its corporate headquarters in New York City. Folio is an affiliate of Saks Fifth Avenue – Stamford, Inc. ("Saks-Stamford"), a Connecticut corporation which is also wholly-owned by Saks and which operates a Saks store in Stamford, Connecticut.

Folio engages in mail order catalog sales from its place of business in Yonkers. Written or telephone purchase orders from Connecticut residents are received in Yonkers. Folio operates a toll-free "800" telephone number for its customers to use to place their orders. Folio sends mail order catalogs and flyers to Connecticut residents. In the pertinent

years 1986 and 1987, approximately 649,000 and 733,000 catalogs, respectively, were sent to Connecticut residents. Folio has also contracted with companies which place ads to sell Folio catalogs several times a year in national fashion magazines. These companies sell the mail order catalogs they advertise in these magazines. Extra copies of Folio mail order catalogs are shipped to the Saks Fifth Avenue store in Connecticut for general managers to use as reference guides, to inform employees of fashion trends, and to provide merchandise information. Tailoring services are available at the Stamford store to Folio customers. The Saks Fifth Avenue store in Stamford also sells merchandise identical to that sold by Folio.

Customers pay for their Folio orders by check or money order or by using their American Express, Visa, MasterCard, Diners Club, or Saks Fifth Avenue credit cards. A Folio customer may obtain a Saks Fifth Avenue charge account application through the Folio mail order form. The credit department of Saks includes advertising pieces, called "bill inserts," in the same envelope as charge account statements sent to customers. These bill inserts contain the toll-free number of Folio. To the extent any sales are generated from Connecticut customers who receive bill inserts, the sales are filled by Folio. Folio pays the cost of the customer return envelope for the billing statement.

"SFA" is an abbreviation for Saks Fifth Avenue. It is part of Folio's name (*SFA* Folio Collections, Inc.) and is used with the permission of its parent corporation, Saks. The name "Saks Fifth Avenue" appears in the Folio mail order catalogs. The distinctive script designs of "Saks Fifth Avenue" and "SFA" are owned by the parent company, Saks.

Folio and Saks share common directors and officers. The same is true of Folio and Saks Fifth Avenue-Stamford, Inc. The Saks Fifth Avenue store in Stamford and Folio share a great variety of daily sales data, monthly sales summaries, and sales inventory levels by category and type of merchandise. They also share financial data and profit and loss statements.

Folio utilizes Saks charge card listings for use in deriving its mailing list. Saks maintains a distribution center in Yonkers, New York, which receives inventory to be distributed to 45 Saks retail stores, including the one in Stamford, Connecticut, and to Folio. The Folio catalog is designed with the help of corporate advertising and corporate marketing, a department of Saks which also aids the Saks Stamford store with its mailings and store catalogs. Decisions as to buying and marketing of merchandise are made with the advice and counseling of Saks executives. Finally, Folio benefits from the use of the Saks Fifth Avenue and SFA trademarks.

As a business entity in and of itself, Folio was assessed the sales and use tax because of the significant commercial contacts it had maintained with the State of Connecticut, and for the services provided by the State, as well as the economic presence demonstrated by the one and a third million catalogs sent into a state of less than three and a half million people of all ages and of all social and economic conditions. In addition, the assessment is also justified as not being in contravention of the Constitution because the group of Saks' corporations, including Saks & Co., the parent/holding company, Folio and Saks-Stamford, are operated as a single retail enterprise, albeit utilizing separate corporations. As a single commercial enterprise, there

is tax nexus with Connecticut given the large department store located within the state.

The Respondent appealed the assessment to the Superior Court of Connecticut under the authority of Conn. Gen. Stat. § 12-422 which provides for a *de novo* trial. *Kimberly-Clark Corp. v. Dubno,* 204 Conn. 137, 144, 527 A.2d 679, 682 (1987). The trial court held for the Respondent based upon this Court's ruling in *National Bellas Hess v. Department of Revenue,* 386 U.S. 753 (1967), and the Connecticut Supreme Court case of *Cally Curtis Co. v. John G. Groppo, Commissioner of Revenue Services,* 214 Conn. 292, 572 A.2d 302 (1990), *cert. denied,* _____ U.S. _____, 111 S.Ct. 77 (1990). The Connecticut Supreme Court affirmed this judgment, 217 Conn. 220, 585 A.2d 666 (1991).

REASONS FOR GRANTING THE WRIT

THE ECONOMIC AND TECHNOLOGICAL DEVELOPMENTS IN THE MAIL ORDER BUSINESS SINCE THE DECIDING OF *NATIONAL BELLAS HESS V. DEPARTMENT OF REVENUE* IN 1967 WARRANT A RECONSIDERATION OF ITS HOLDING IN AN AREA OF TAX LAW WHICH IS OF VITAL IMPORTANCE, NOT ONLY TO CONNECTICUT BUT TO ALL STATES WITH A SALES AND USE TAX.

Nearly a quarter of a century ago, this Court decided that a mail order seller which does not maintain an actual physical presence in a state may not constitutionally be required to collect that state's sales and use tax on sales within the state. *National Bellas Hess, Inc. v. Dept. of Revenue,* 386 U.S. 753 (1967). In the twenty-four years since that decision,

mail order sales have exploded into a major industry impacting significantly on the economic climate of the nation and creating an economic presence within individual states which is often substantially more significant than mere physical presence. Also in the intervening years, technological advances in computer software have rendered once complex and time-consuming calculations a quick and easy exercise.

Due to these developments, state courts around the country are being forced to confront this issue head-on with inconsistent conclusions. In fact, a trial court in Tennessee has distinguished *Bellas Hess* based on these developments in a case involving the very company at issue here, SFA Folio Collections. *SFA Folio Collections, Inc. v. Huddleston,* No. 89-3015-III (Ch. Tenn. March 11, 1991) (*see* further discussion, *infra* at page 12).

Because of the reality of the present day mail order business not existing in 1967 and its impact on state tax collections, the Petitioner asks this Court to revisit its decision in *Bellas Hess* and fashion a nexus test for state tax purposes which reflects the evolution of both the industry itself and concepts of due process.

At the least, the Petitioner asks the Court to hold that, in the circumstances of this case, where the Respondent mail order company not only actively and frequently solicited sales within Connecticut by means of its catalogs but also was part of a corporate enterprise containing an affiliate store located within the state, sufficient nexus exists to justify the collection of the use tax on all mail order sales.

In *Bellas Hess* the Court held that the Illinois use tax at issue failed to satisfy the Constitution in two related ways.

First, the Court found that it violated the Constitution because the mail order company had insufficient connection with, and received too little benefit from, the state to warrant the imposition of a tax collection responsibility on mail order sales. Second, the Court held that the use tax collection duty violated the Commerce Clause by placing a burden on interstate commerce unrelated to any benefits that the company received from the state. In reaching its conclusion, the Court focused primarily on two things: the lack of any physical property of the mail order company within the taxing state, and the burden on interstate commerce caused by what the Court viewed as a "virtual welter of complicated obligations" in administering the tax collections. *Id.* at 759-60. In both of these areas, the passage of time has wrought significant changes.

The focus of the first – the lack of property located within the taxing state – reflected the then-current emphasis on physical presence as the touchstone in due process analysis, whether in the taxing or jurisdictional arenas. In the intervening years, however, jurisdictional jurisprudence has come to focus on (1) whether the commercial actor's activities are "purposefully directed toward" residents of the state, *Asahi Metal Industry Co., Ltd. v. Superior Court of California,* 480 U.S. 102, 112 (1987); *Burger King Corp. v. Rudzewicz,* 471 U.S. 462, 473-75 (1985); and *Keeton v. Hustler Magazine, Inc.,* 465 U.S. 770, 774 (1984); and (2) whether activities that are performed by or on behalf of the taxpayer "are significantly associated with the taxpayer's ability to establish and maintain [an in-state] market . . . for the sales."

Tyler Pipe Industries, Inc. v. Washington Department of Revenue, 107 S.Ct. 2810, 2822 (1987).[1]

Simple physical presence within a state often is unrelated to the size and significance of a corporation's economic presence in and benefit from a state. Under the holding of *Scripto, Inc. v. Carson,* 362 U.S. 207 (1960), it seems clear that if the Respondent had a few in-state agents soliciting sales, that connection alone would be sufficient nexus to justify a use tax collection duty. Yet the reality here is that the Respondent's economic presence in Connecticut is many times more substantial than the *Scripto* presence. In the space of two years, Folio distributed over 1.3 million catalogs in a state whose population is less than 3.5 million. By means of a toll-free "800" telephone number, Folio has made catalog shopping a convenient in-home activity and, by means of an in-state affiliate sharing the same distinctive corporate logo, much of the same merchandise, and the same Saks Fifth Avenue charge account service, Folio has taken significant measures to entice the Connecticut consumer to purchase its products.

The very size and aggressiveness of this solicitation reflects the development in the mail order business since *Bellas Hess* was decided twenty-four years ago. At that time, national mail order sales amounted to $2.4 billion. 386 U.S. at 763 (Fortas, J., dissenting). Such sales for 1983 were estimated to over $150 billion, and this explosion is expected to continue through the balance of this century. *See* McCray,

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[1]For a comprehensive analysis of the Court's decisions in this area and a description of its developing due process standards in the areas of personal and tax jurisdiction, *see* McCray, 1985 B.Y.U. L. Rev. 265.

Overturning Bellas Hess: Due Process Considerations, 1985 B.Y.U. L. Rev. at 265, n. 3. The rate of growth of mail order sales has been estimated at 8% to 12% per year. Advisory Committee on Intergovernmental Relations, *State and Local Taxation of Out-of-State Mail Order Sales,* 4 (April 1986).

Even more startling are the technological advances since *Bellas Hess* which are now available to mail order sellers and buyers. Advances in communication have been developed and widely accepted; "800" telephone numbers are now the functional equivalent of local phone numbers because no cost is charged to the buyer. The use of FAX machines for purchases is another post-*Bellas Hess* phenomenon.

To say that Folio derives no benefit from the state of Connecticut is to ignore the obvious. First and foremost, Folio enjoys a substantial and profitable economic market in its Connecticut customers – customers who, but for the lure of Folio, would probably have purchased their goods from in-state companies and paid a sales tax directly. Second, Folio depends upon the state of Connecticut to dispose of the millions of catalogs it sends into the state for its own benefit. The problems of garbage disposal and landfill overflow were not recognized at the time of *Bellas Hess* but are now major environmental concerns. Certainly, Folio's actions place a burden on the State which must be addressed.

Further, the Saks parent company derives a profit not only from Folio's Connecticut sales but also from Saks-Stamford's Connecticut sales. Under the holdings in *Nelson v. Montgomery Ward and Company, Inc.,* 312 U.S. 373 (1941), and *Nelson v. Sears, Roebuck & Co.,* 312 U.S. 359 (1941), if Saks-Stamford and Folio were part of one corporation, rather than a unitary enterprise of closely related corpora-

tions, Folio could be required to collect use taxes on its mail order sales even if they were unrelated to its store sales. See *National Geographic Society v. California Board of Equalization,* 430 U.S. 551 (1977). It seems to be denying reality to permit Saks to avoid this responsibility while still reaping the benefits by the device of creating a corporate enterprise with wholly-owned subsidiaries rather than one corporate entity.

In return for the benefits it receives, Folio is being asked not to *pay* a use tax but merely to *collect* one from Connecticut residents whose disposal of Folio catalogs costs the State money. The burden on Folio's interstate commerce centers primarily around the administrative requirements necessitated by collecting and forwarding the tax to Connecticut officials. However, what the *Bellas Hess* Court viewed in 1967 as "administrative and recordkeeping requirements [which] could entangle National's business in a virtual welter of complicated obligations to local jurisdiction," 386 U.S. at 759-60, are requirements very easily handled by relatively inexpensive computer hardware and software.

The intervening years have witnessed a most rapid development in the area of computer technology. The calculation of the various sales and use tax rates for each state, which would have been nearly impossible in 1967, can now, with available computer programs, be done cheaply, easily, and quickly. *See* Hartman, *Collection of the Use Tax on Out-of-State Mail-Order Sales,* 39 Vand. L. Rev. 993, 1011-12 (1986). Certainly, Folio, which is capable of targeting an estimated 20,000,000 catalogs a year nationally, Scroge, *Inside the Leading Mail Order Houses* (1989), now has the same ability to fulfill the use tax collection obligation as any other retailer. Any burden of compliance can now only be viewed

as minimal and not truly the burden to interstate commerce it once was.

This Connecticut case is one in a growing list of mail order sales and use tax cases being decided under or distinguished from *Bellas Hess*. The trial courts of Pennsylvania and North Dakota have held *Bellas Hess* as a total barrier to taxing out-of-state mail order sales, *L.L. Bean, Inc. v. Commonwealth Department of Revenue*, 101 Pa. Commw. 435, 516 A.2d 820 (1986); *Bloomingdale's By Mail, Ltd. v. Commonwealth Department of Revenue*, 130 Pa. Commw. 190, 567 A.2d 773 (1989); and *North Dakota v. Quill, Inc.*, No. 41677 (Dist. Ct. N.D. May 15, 1990) (*appeal pending*) App. p. A51, whereas the trial courts of Tennessee have sustained the constitutionality of sales and use tax collection obligations. Particularly noteworthy is that SFA Folio Collections, the Respondent here, was one of the parties in the Tennessee litigation. These cases distinguished *Bellas Hess* on the factual developments which have occurred since 1967. *SFA Folio Collections, Inc. v. Huddleston*, No. 89-3015-III (Ch. Tenn. March 11, 1991) App. p. A45, and *Bloomingdale's By Mail, Ltd. v. Huddleston*, No. 89-3017-II (Ch. Tenn. March 8, 1991) App. p. A40.

The *Bellas Hess* decision established a simple mechanical rule for state tax jurisdiction. This limited approach is similar in concept to the approach once espoused by this Court with regard to state corporation income/franchise taxes. In *Spector Motor Service v. O'Connor*, 340 U.S. 508 (1951), the Court held that a franchise tax measured by income cannot be validly applied to a corporation conducting interstate commerce even though the tax was nondiscriminatory and fairly apportioned. A similar tax, in economic terms, but one reworded with "magic words or labels"

In *Complete Auto Transit, Inc. v. Brady* 430 U.S. 247 (1978), a unanimous Court overruled *Spector*. The holding in *Spector* "deem[ed] irrelevant any consideration of the practical effect of the tax." *Id.* at 274. In place of a rule with "no relationship to economic realities," *id.* at 279, the Court established a comprehensive four-prong Commerce Clause analysis to be applied when interstate business is made the subject of a state tax.

Because of the enormity of the economic impact of mail order businesses on the individual states and the concomitant loss of tax revenue occasioned by sales to these businesses, the Petitioner ask this Court to reconsider *Bellas Hess* and modify its holding to reflect the economic and technological realities of the present day mail order market.

CONCLUSION

Doctrines which form the underpinning of the Commerce Clause have evolved in the last quarter of a century along with retailing practices and technology advances. The doctrine enunciated in *National Bellas Hess* in 1967 is today difficult to properly and realistically apply to mail order transactions in the 1990's and beyond. This Court is urged to grant the within petition and to address this important issue of state sales and use taxes which is developing into a clear divergence of holdings by the courts of the various states.

Respectfully submitted,
Petitioner

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APPENDIX TABLE OF CONTENTS

PAGE

Opinion of the Connecticut Supreme court in the case of *SFA Folio Collections, Inc. v. Timothy F. Bannon, Commissioner of Revenue Services,* No. 14023 (January 22, 1991) A1

Memorandum of Decision of the Connecticut Superior Court in the case of *SFA Folio Collections, Inc. v. Timothy F. Bannon, Commissioner of Revenue Services,* Judicial District of Hartford/New Britain at Hartford, No. CV 87-0338611 S (April 20, 1990) A21

Stipulation of Facts filed with the Superior Court of the State of Connecticut A29

Bloomingdale's By Mail, Ltd. v. Huddleston, No. 89-3017-II (Ch. Tenn. March 8, 1991) A40

SFA Folio Collections, Inc. v. Huddleston, No. 89-3015-III (Ch. Tenn. March 11, 1991) A45

North Dakota v. Quill, Inc., No. 41677 (Dist. Ct. N.D. May 15, 1990) A51

Conn. Gen. Stat. § 12-422 . . . . . A56

SFA FOLIO COLLECTIONS, INC. *v.* TIMOTHY F. BANNON, COMMISSIONER OF REVENUE SERVICES (14023)

PETERS, C. J., SHEA, COVELLO, HULL and BORDEN, Js.

The plaintiff, F Co., a New York mail order company that is a wholly owned subsidiary of S Co., another New York corporation, which operates a store in Connecticut, appealed to the trial court from the assessment of sales and use tax liability by the defendant commissioner of revenue services. In assessing tax liability, the commissioner asserted that because F Co. mailed catalogs to Connecticut residents, maintained a toll-free "800" telephone number for customer use, placed advertising in magazines that ultimately reached Connecticut residents, and sent extra copies of catalogs to S Co.'s Connecticut store, F Co.'s business had a sufficient nexus with this state to justify the imposition of taxes. The commissioner further claimed that because F Co. is part of a larger enterprise of affiliated corporations, F Co. should be deemed to share the nexus that S Co. has with Connecticut. The trial court rendered judgment sustaining the plaintiff's appeal, from which the commissioner appealed. *Held*:

1. The trial court correctly determined that the imposition of sales and use taxes on F Co. was a violation of the due process and commerce clauses of the United States constitution because F Co. lacked sufficient nexus to this state, and that court's finding that F Co. and S Co. are separate and independently functioning corporate entities was not clearly erroneous.
2. The commissioner could not prevail on his claim that because commercial activity in a state is often sufficient for a state to assert personal

jurisdiction over an out-of-state company, such contact should be sufficient to support state taxation on an out-of-state mail order company, like F Co. whose only contacts with the state are through the United States mail and common carriers.

Argued November 8, 1990—decision released January 22, 1991

Appeal from the assessment of, inter alia, a sales and use tax liability against the plaintiff, brought to the Superior Court in the judicial district of Hartford-New Britain at Hartford and tried to the court, *Satter, J.*; judgment sustaining the plaintiff's appeal, from which the defendant appealed. *Affirmed.*

Richard K. Greenberg, assistant attorney general, with whom were *John G. Haines*, assistant attorney general, and, on the brief, *Clarine Nardi Riddle*, attorney general, and *Jane D. Comerford*, assistant attorney general, for the appellant (defendant).

Maryann B. Gall, with whom were *Laura A. Kulwicki* and *William H. Narwold*, for the appellee (plaintiff).

BORDEN, J. The issue in this tax appeal is whether the trial court correctly determined that the imposition of Connecticut sales and use taxes on the plaintiff, SFA Folio Collections, Inc. (Folio), a mail order company, was a violation of the due process and commerce clauses of the United States constitution because Folio lacks a sufficient nexus to the state. The defendant, the commissioner of revenue services (commissioner), assessed Folio with sales and use taxes pursuant to General Statutes § 12-406 et seq., asserting that a sufficient nexus between the state and Folio existed, primarily because Folio was part of an "enterprise" of other affiliated corporations, one of which, Saks Fifth Avenue Stamford, Inc. (Saks-Stamford), clearly had a taxable nexus to the state. We affirm the judgment of the trial court.

In February, 1987, the commissioner informed Folio that it was required to begin collection and remittance of sales and use taxes because it satisfied the definition of "[e]ngaged in business in the state" pursuant to General Statutes § 12-407 (15).[1] Folio had neither applied for a permit to collect such taxes in Connecticut, nor had it ever collected such taxes on its catalog sales to Connecticut residents. In justifying the imposition of the tax liability, the commissioner stated that "[t]he unitary nexus established from [Folio's] shared corporate name, logo, etc., with Saks Fifth Avenue-Stamford, Inc. is the basis of our position." The commissioner thereafter requested that Folio register with the department of revenue services and begin to collect the appropriate taxes on its catalog sales to Connecticut customers. Folio contested, as an unconstitutional application of Connecticut law, the imposition of a duty upon it to register pursuant to General Statutes § 12-411 (8).

The commissioner notified Folio that its registration application had been processed and its tax registration number assigned, although Folio had not applied for such a number. The commissioner then informed Folio

[1] General Statutes § 12-407 (15) provides: " 'Engaged in business in the state' means selling in this state, or any activity in this state in connection with selling in this state, tangible personal property for use, storage or consumption within the state or engaging in the transfer for a consideration of the occupancy of any room or rooms in a hotel or lodging house for a period of thirty consecutive calendar days or less, or rendering in this state any service described in any of the subdivisions of subsection (2) of this section. The term shall include but shall not be limited to the following acts or methods of transacting business: (a) Maintaining, occupying or using, permanently or temporarily, directly or indirectly, through a subsidiary or agent, by whatever name called, of any office, place of distribution, sales or sample room or place, warehouse or storage point or other place of business or (b) having any representative, agent, salesman, canvasser or solicitor operating in this state for the purpose of selling, delivering or taking orders."

that it would be issued an assessment of its tax liability. Thereafter, the commissioner imposed on Folio an assessment of $234,450.28, which comprised $163,052.71 in sales and use taxes, $55,072.25 in interest, and $16,305.32 in penalty costs. The commissioner later issued Folio an additional assessment of $20 for a sales and use tax license and permit.

Folio filed a petition for reassessment with the commissioner pursuant to General Statutes § 12-421, asserting that it was not "engaged in business" in Connecticut pursuant to § 12-407 (15), and, therefore, could not constitutionally be required to collect or to pay Connecticut sales and use taxes on its mail order sales to Connecticut residents. The commissioner denied Folio's appeal, and confirmed the assessment. Folio appealed the decision to the Superior Court pursuant to General Statutes § 12-422. The trial court reversed the decision of the commissioner, concluding that Folio did not have a sufficient nexus to Connecticut to sustain the imposition of a sales and use tax. The commissioner appealed to the Appellate Court, and we transferred the case to ourselves pursuant to Practice Book § 4023.

The facts stipulated by the parties may be summarized as follows. Folio, a wholly owned subsidiary of Saks & Company, conducts a nationwide mail order business. Both Folio and Saks & Company are New York corporations. Folio's principal place of business is in Yonkers, New York, and Saks & Company's corporate headquarters are in New York City. The two corporations share a number of common directors and officers, although each corporation maintains separate management for day-to-day operations. Additionally, Folio, with the consent of Saks & Company, maintains as part of its corporate name the "SFA" registered trademark of "Saks Fifth Avenue." This trademark, which often appears in Folio's catalogs, characterizes

the high quality of merchandise and service traditionally associated with Saks & Company. To the extent that a customer associates "SFA" with Saks Fifth Avenue, Folio is benefited.

Saks & Company, in addition to owning Folio, owns Saks-Stamford, a separate corporation that operates a retail store in Stamford, Connecticut. Folio and all Saks Fifth Avenue retail stores, including Saks-Stamford, share sales and financial data and profit and loss statements. The management groups for Folio and Saks-Stamford, however, are separate and operate autonomously. Although the corporations are independent, Folio does, through its printers,[2] send extra copies of its mail order catalog by common carrier to the Saks-Stamford general manager in order to inform store employees of fashion trends, to be used as reference guides, and to serve as merchandise educational tools. Folio customers may also use Saks-Stamford's tailoring services for a standard fee, but these services are also available to the public at large regardless of where an item was purchased. Folio sells some of the same items that are available at Saks-Stamford, but many of these items are also available at other retail stores throughout the country.

In conducting its business, Folio distributes mail order catalogs[3] and flyers to Connecticut residents and receives orders either by mail or by telephone. Customers pay for their orders by credit card or check,[4]

[2] Folio's printers are located outside of Connecticut.

[3] Folio does not design, prepare, print, publish or mail its catalogs in or from Connecticut.

[4] Folio does not fill any order that is paid by check until the check has been cleared by the bank, thereby eliminating the need to use the Connecticut court system in order to collect bad debts. Additionally, Folio does not bear the risk of loss for any purchases by credit card, as such risk falls upon the credit card company, further eliminating any claim that Folio derives benefits from the Connecticut court system.

and Folio fills them in Yonkers, New York. Customers may use their Saks & Company charge card when making purchases from Folio, as well as when buying items at Saks-Stamford. Folio often includes advertising for Folio in the form of "bill inserts" in the charge card bill received by the customer from Saks & Company. Folio does, however, pay for the customer's return envelope accompanying the billing statement. Folio delivers purchases to Connecticut buyers either through the mails or by common carrier, with the customers paying for the shipping, handling, and transportation of their orders. Folio refers its customers to its Yonkers office for customer assistance, merchandise return or exchange, and other services.

Folio does not operate retail stores, and does not maintain under its corporate name any store, office, distribution house, sales house, sample room, warehouse, or other place of business in Connecticut. Folio does not have any solicitors, canvassers, sales persons, authorized agents, or representatives in Connecticut. Folio is not licensed to do business in Connecticut, and has no inventory or merchandise in the state. Folio does not maintain a phone number in Connecticut; all customer contact is through the use of a toll free "800" number. Folio has no bank accounts in Connecticut, does not retain security interests in any goods sold to Connecticut residents, and does not investigate credit or collect accounts in Connecticut.

The commissioner first claims that the trial court incorrectly determined that there was such an absence of the requisite nexus between Folio and Connecticut that the imposition of the sales and use taxes violated the due process and commerce clauses of the federal constitution. While the commissioner asserts that Folio, independently, has a sufficient nexus to Connecticut, his primary claim in this regard is that, under an enter-

prise theory, the presence in Connecticut of an affiliated corporation, namely, Saks-Stamford, supplies Folio with a sufficient nexus to sustain the imposition of sales and use taxes. Secondly, the commissioner claims that, in light of the developments in "the judicial analysis of due process and the mail-order industry," the due process standard applicable to personal jurisdiction claims should be employed so that an "economic presence" in Connecticut satisfies the nexus requirement for state taxation. We disagree.

I

This appeal is governed by the United States Supreme Court decision in *National Bellas Hess, Inc.* v. *Department of Revenue*, 386 U.S. 753, 87 S. Ct. 1389, 18 L. Ed. 2d 505 (1967), and our recent decision in *Cally Curtis Co.* v. *Groppo*, 214 Conn. 292, 572 A.2d 302, cert. denied, U.S. , 111 S. Ct. 77, 112 L. Ed. 2d 50 (1990). In *National Bellas Hess, Inc.*, the United States Supreme Court determined that constitutional constraints limit the authority of a state to impose sales and use tax liability upon an out-of-state seller. *National Bellas Hess, Inc.* v. *Department of Revenue*, supra, 756; *Cally Curtis Co.* v. *Groppo*, supra, 297. "Such a collection burden when placed upon an out-of-state seller triggers due process concerns as well as imposes a restraint upon interstate commerce." *Cally Curtis Co.*, v. *Groppo*, supra; see also *National Bellas Hess, Inc.* v. *Department of Revenue*, supra; *L.L. Bean, Inc.* v. *Department of Revenue*, 516 A.2d 820, 824 (Pa. Commw. 1986). In *Cally Curtis Co.*, we reaffirmed the applicability of *National Bellas Hess, Inc.*, to a claim of taxability like that asserted in this case, and held that where the only nexus between Connecticut and the corporation was the in-state presence for three days of video tapes leased by the out-of-state corporation to its in-state customers, an insufficient nexus existed to warrant the imposition of the Connecticut use tax. *Cally Curtis Co.* v. *Groppo*, supra, 301.

In determining whether a state tax conforms with constitutional due process requirements, the United States Supreme Court has held that the " 'simple but controlling question is whether the state has given anything for which it can ask return. " *National Bellas Hess, Inc.* v. *Department of Revenue*, supra, quoting *Wisconsin* v. *J. C. Penney Co.*, 311 U.S. 435, 444, 61 S. Ct. 246, 85 L. Ed. 267 (1940). Because Congress has the exclusive authority to regulate interstate commerce, " '[s]tate taxation falling on interstate commerce. . . can only be justified as designed to make such commerce bear a fair share of the cost of the local government whose protection it enjoys.' " *National Bellas Hess, Inc.* v. *Department of Revenue*, supra, 756, quoting *Freeman* v. *Hewit*, 329 U.S. 249, 253, 67 S. Ct. 274, 91 L. Ed. 265 (1946); see also *Cally Curtis Co.* v. *Groppo*, supra, 298. Therefore, the relevant legal inquiry in reviewing the constitutionality of imposing the duty of collection of such a tax upon an out-of-state seller is whether there exists " 'some definite link, some minimum connection, between a state and the person, property or transaction it seeks to tax.' " *National Bellas Hess, Inc.* v. *Department of Revenue*, supra, quoting *Miller Bros. Co.* v. *Maryland*, 347 U.S. 340, 344–45, 74 S. Ct. 535, 98 L. Ed. 744 (1954); see also *Cally Curtis Co.* v. *Groppo*, supra. "The existence of such a link or nexus will turn upon the individual facts of each case." *Cally Curtis Co.* v. *Groppo*, supra.

At the outset, the commissioner claims that Folio's contacts with Connecticut are greater than those of the taxpayers in *National Bellas Hess, Inc.*, and *Cally Curtis Co.* These alleged contacts consist of the large number of catalogs Folio mails to Connecticut residents,[5]

[5] Folio mailed to Connecticut residents 649,000 catalogs in 1986 and 733,000 catalogs in 1987.

the operation of a toll-free "800" number for customer use, the placement of advertisements in magazines that ultimately reach Connecticut residents, and the extra copies of its catalogs that Folio sends to Saks-Stamford's general manager for business use. The trial court, in examining this claim of nexus, however, found "the facts of *National Bellas Hess, Inc.*, and *Cally Curtis Co.* indistinguishable from the facts of this case."

In reviewing the trial court's determination, in this context, "the effect of admitted facts is a question of law." *Nelson* v. *Montgomery Ward & Co.*, 312 U.S. 373, 376, 61 S. Ct. 593, 85 L. Ed 897 (1941). Therefore, the relevant inquiry is whether any of the asserted contacts establish some definite link or some minimum connection between Folio and Connecticut. *National Bellas Hess, Inc.* v. *Department of Revenue*, supra.

The commissioner's claim of nexus based upon the catalogs ignores the fact that the catalogs, once delivered to Connecticut residents, are the property of the residents, not Folio.[6] Such activity, therefore, does not establish a taxable link between Folio and the state. The use of a toll-free "800" number for Connecticut residents to place orders likewise does not demonstrate a sufficient link to Connecticut. *L.L. Bean, Inc.* v. *Department of Revenue*, supra, 825. Additionally, the advertisements for Folio that appear in magazines are not created or placed in magazines in Connecticut. The fact that the magazines eventually are sold in Connecticut does not establish a nexus between Folio and the state. Finally, the catalogs sent by Folio's printers to Saks- Stamford do not establish a link to Connecticut because these catalogs are used for employee training

[6] The commissioner's argument that Folio derives benefit from Connecticut by virtue of the state disposing of the catalogs as paper trash is likewise without merit. Because the catalogs are the property of the Connecticut residents, it is axiomatic that it is the resident who is deriving the benefit from the state and who must contribute to the cost of the disposal.

and reference purposes, not for the purpose of having the Saks-Stamford employees solicit Folio sales from Connecticut residents. Compare *Scripto, Inc.* v. *Carson*, 362 U.S. 207, 80 S. Ct. 619, 4 L. Ed. 2d 660 (1960).

On the facts of this case, we can discern no greater nexus between Connecticut and Folio than existed between Connecticut and the out-of-state corporation in *Cally Curtis Co.* We conclude, therefore, that Folio, viewed independently, does not have a nexus to Connecticut sufficient to support the imposition of sales and use taxes.

We turn, therefore, to the commissioner's primary claim, namely, that because Folio is part of a larger enterprise of affiliated corporations, Folio should be deemed to share the nexus that Saks-Stamford has with Connecticut. We are not persuaded.

The parties do not contest that Saks-Stamford is a Connecticut corporation responsible for paying Connecticut sales and use taxes because it has local retail stores in the state. *Nelson* v. *Sears, Roebuck & Co.*, 312 U.S. 359, 61 S. Ct. 586, 85 L. Ed. 888 (1941). The parties disagree, however, about the implications to be drawn from the connections between these affiliated but independent corporations when the issue is the sufficiency of Folio's nexus to Connecticut for sales and use tax purposes.

Significantly, the commissioner does not assert that we should find a nexus pursuant to a "piercing the corporate veil"[7] or "alter ego"[8] theory. The commissioner

[7] The disregard of a technically correct corporation "in terms of a metaphor, is often called 'piercing the corporate veil.' " H. Henn & J. Alexander, Laws of Corporations (3d Ed. 1983) § 146, p. 344. "The concept [of corporateness] will be sustained only so long as it is invoked and employed for legitimate purposes. Perversion of the concept to improper uses and dishonest ends (e.g., to perpetuate fraud, to evade the law, to escape obligations), on the other hand, will not be countenanced." Id., § 146, p. 346.

[8] "A conventional statement of [the 'alter ego' doctrine] declares that 'piercing the veil' is proper when (1) such unity of ownership and interest

does not dispute the trial court's factual finding that the Folio and Saks-Stamford are "distinct corporate entities." Rather, the commissioner claims that because these separate entities are linked by their common corporate parent, Saks & Company, their separate corporate existence should be disregarded and they should be treated as one enterprise for the purposes of establishing a nexus for taxation.[9] Should such a determination be made, Folio would be subject to sales and use tax liability, despite the lack of an independent nexus with Connecticut, because it would be "plainly accorded the protection and services of the taxing State"; *National Bellas Hess, Inc.* v. *Department of Revenue*, supra, 757; as a result of the presence of the Saks-Stamford retail store in Connecticut *Nelson* v. *Montgomery Ward & Co.*, supra; *Nelson* v. *Sears, Roebuck & Co.*, supra.

It is undisputed that in Connecticut a court will disregard the corporate structure and pierce the corporate veil " 'only under exceptional circumstances, for example, where the corporation is a mere shell, serving no legitimate purpose, and used primarily as an intermediary to perpetuate fraud or promote injustice.' " *Angelo Tomasso, Inc.* v. *Armor Construction & Paving, Inc.*,

exists that the two affiliated corporations have ceased to be separate and the subsidiary has been relegated to the status of the 'alter ego' of the parent; and (2) where recognition of them as separate entities would sanction fraud or lead to an inequitable result." P. Blumberg, The Law of Corporate Groups, Statutory Law-General (1987) § 2.02.2, p. 37.

[9] "Traditionally, the law has viewed each corporation as a separate legal entity, with separate rights and obligations. For legal purposes, a bright line of distinction was drawn between the corporation and its shareholders." P. Blumberg, The Law of Corporate Groups, Procedural Law (1983) § 1.01.1, p. 1. The "[e]ntity theory" of corporate law is the premise "that a corporation is a fictitious, artificial, legal person or juristic entity . . . . [On the other hand,] [t]he 'enterprise theory' stresses the underlying commercial enterprise, without emphasis on the entity-aggregate distinction of the components." H. Henn & J. Alexander, Laws of Corporations (3d Ed. 1983) § 78, pp. 145-46.

187 Conn. 544, 557, 447 A.2d 406 (1982). Nevertheless, the commissioner seeks to have this court abandon our traditional notions of corporate law and ignore Folio's separate corporate existence under an enterprise theory. In support of this legal proposition, the commissioner relies on three authorities: (1) the "unitary business" principle articulated in *Container Corporation of America* v. *Franchise Tax Board*, 463 U.S. 159, 103 S. Ct. 2933, 77 L. Ed. 2d 545, reh. denied, 464 U.S. 909, 104 S. Ct. 265, 78 L. Ed. 2d 248 (1983); (2) Dean Phillip I. Blumberg's four volume treatise, The Law of Corporate Groups; and (3) the Connecticut Superior Court case of *Hartford Steam Services Co.* v. *Sullivan*, 26 Conn. Sup. 277, 220 A.2d 772 (1966).

First, the commissioner cites *Container Corporation of America* v. *Franchise Tax Board*, supra, as support for the proposition that "[w]here a group of corporations are formed and operated as a unitary enterprise, there is no constitutional barrier to the group being viewed as a unitary enterprise and taxed as such." The commissioner fails to recognize, however, that the "unitary business principle" is a statutorily created system of calculating corporate income tax "by first defining the scope of the 'unitary business' of which the taxed enterprise's activities in the taxing jurisdiction form one part, and then apportioning the total income of that unitary business between the taxing jurisdiction and the rest of the world on the basis of a formula taking into account objective measures of the corporation's activities within and without the jurisdiction." Id., 165. Clearly, there is no statute within the Connecticut sales and use tax chapter; General Statutes § 12-406 et seq.; that allows the commissioner to treat separate corporations as part of one enterprise for the purpose of imposing sales and use tax liability, and the commissioner does not make such a claim. Absent such statu-

tory authority, the line of cases pursuant to the "unitary business principle" are inapplicable.

Second, the commissioner cites as support for the enterprise theory Dean Phillip I. Blumberg's four volume treatise on The Law of Corporate Groups, supra. Without determining whether the commissioner's general reference to the multivolume treatise constitutes adequate briefing of the issue, we find no legal support therein for the commissioner's conclusion that "[s]imply stated, the fact that the Saks-Stamford store and Folio are wholly-owned affiliated corporations rather than divisions of the same corporation is without constitutional significance and not controlling."

To the contrary, it is a fundamental principle of corporate law that "the parent corporation and its subsidiary are treated as separate and distinct legal persons even though the parent owns all the shares in the subsidiary and the two enterprises have identical directors and officers. Such control, after all, is no more than a normal consequence of controlling share ownership." H. Henn & J. Alexander, Laws of Corporations (3d Ed. 1983) § 148, p. 355. Furthermore, the separate corporate entities or personalities of affiliated corporations will be recognized, absent illegitimate purposes, unless: "(a) the business transactions, property, employees, bank and other accounts and records are intermingled; (b) the formalities of separate corporate procedures for each corporation are not observed . . . (c) the corporation is inadequately financed as a separate unit from the point of view of meeting its normal obligations . . . (d) the respective enterprises are not held out to the public as separate enterprises; (e) the policies of the corporation are not directed to its own interests primarily but rather to those of the other cor-

poration." H. Henn & J. Alexander, supra, § 149, pp. 355–56; see also *Hammond* v. *United States*, 764 F.2d 88, 100 (2d Cir. 1985).[10]

This is not a situation where the corporate assets have been intermingled, where the formalities of separate corporate procedure have been ignored, or where the corporation is inadequately financed. Additionally, as determined by the trial court,[11] the corporations are

[10] In *Hammond* v. *United States*, 764 F.2d 88, 100 (2d Cir. 1988), the Court of Appeals for the Second Circuit, in reviewing a decision of the United States District Court for the District of Connecticut, noted that "at times, both state law and the [Internal Revenue Code] abandon the notion of the separate identity of corporations for narrow purposes and in limited situations[;] see, e.g. *United States* v. *Reading Co.*, 253 U.S. 26, 62–63, 40 S. Ct. 425, 434, 64 L. Ed. 760 (1920) (where subsidiary is mere agent or instrumentality of parent, separate corporate existence of subsidiary may be ignored); *Weisser* v. *Mursam Shoe Corp.*, 127 F.2d 344, 348 (2d Cir. 1942) (same); N.Y. Bus. Corp. Law § 630 (McKinney 1963) (largest shareholders liable for wage debt of insolvent corporations); IRC § 951(a), 26 U.S.C. § 951(a) (1982) (income of controlled foreign corporation deemed to be income of corporation's shareholder); IRC § 481, 26 U.S.C. 481 (1982) (authorizing IRS to reallocate income among commonly-held businesses so as to prevent tax evasion). . . ." Similarly, the Court of Appeals for the Tenth Circuit has recently held that "[w]e believe that the separate treatment for tax purposes of parent and wholly-owned subsidiary should not be extended when we can see no business purpose beyond an opportunity to manipulate for tax purposes." *Marathon Oil Co.* v. *Commissioner of Internal Revenue*, 838 F.2d 1114, 1120 (10th Cir. 1987).

While these decisions are not binding precedent on this court, *Hammond* and *Marathon Oil Co.* lend further support to our conclusion that it is not the place of this court to ignore the separate entity of a corporation absent a fraudulent, evasive, or manipulative purpose in forming or maintaining the corporation. The commissioner has made no claim that Folio was incorporated or maintained for the purpose of evading sales and use taxes, and no such claim would be credible based upon the evidence presented at trial. Compare *Hartford Steam Services Co.* v. *Sullivan*, 26 Conn. Sup. 277, 220 A.2d 772 (1966) (subsidiary mere paper corporation).

[11] The trial court concluded that "[a]lthough [Folio and Saks-Stamford] have some common directors and officers, are affiliates of the same parent company, use the same trademarks and logos, sell similar merchandise and share financial and market information, they are distinct corporate entities. Saks-Stamford is not Folio's retail store, agent instrumentality, or alter ego. The finding of the Commissioner's unit chief that Folio is

not held out to the public as one entity. Because we conclude that the finding of fact that Folio is a separate corporate entity was not clearly erroneous; *French* v. *Clinton*, 215 Conn. 197, 205, 575 A.2d 686 (1990); we would not be justified in disregarding Folio's separate identity for tax purposes. *Angelo Tomasso, Inc.* v. *Armor Construction & Paving, Inc.*, supra, 557.

In further support of his contention that this court should apply an economic enterprise theory, the commissioner argues that if we recognize a constitutional distinction between affiliated corporations, such as in this case, and divisions of the same company; *Nelson* v. *Sears, Roebuck & Co.*, supra; the result would be that "any retailer with an out-of-state mail order component could avoid collecting sales and use tax simply by separately incorporating the retail and mail order businesses." While we agree with the commissioner's assertion, we conclude that it does not support his claim for rejecting Folio's corporate entity and applying the enterprise theory.

The commissioner's argument demonstrates a misunderstanding of a fundamental principle underlying our system of taxation, namely, that " 'taxpayers may arrange their affairs to minimize their tax liabilities. Unlike tax evasion, tax avoidance through careful planning of both transactions and corporate structure is a legitimate right of every taxpayer.' " Jurinski, "Agency Relationships in Determining Nexus: Groping for a Solution," 7 Journal of Taxation 321, 321 (1989). Furthermore, the commissioner ignores the fact that a business that is incorporated separately from a parent or affiliated corporation incurs additional burdens by the very fact of its separate corporate existence. Indeed,

engaged in business in Connecticut because a 'unitary nexus' was established by its 'shared corporate name, logo, etc., with Saks Fifth Avenue Stamford Inc.' has no basis in the evidence or the law."

as Folio argues, because of its separate corporate existence it must register with the secretary of the state, qualify to do business, hold a corporate charter, issue stock, maintain corporate minute books, file corporate income tax returns, and remit payroll and unemployment taxes. Folio is also subject to suit for contractual and other obligations that stem from the conduct of its business. Even as a part of a deliberate tax-avoidance strategy, the fact that Folio is incorporated as an entity separate from Saks-Stamford and Saks & Company does not, standing alone, permit a taxing authority to disregard Folio's corporate identity.

The commissioner also relies upon the decision of the Superior Court in *Hartford Steam Services Co.* v. *Sullivan*, supra, to support the application of the enterprise theory to Folio for state tax purposes. In describing the economic enterprise theory, the court, *Parskey, J.*, stated that "[t]his is not the negative concept variously described as 'piercing the corporate veil' or 'disregarding the corporate fiction,' a concept based on equitable principles and designed to frustrate fraud, misrepresentation or illegality. It is, rather, a positive principle, the effect of which is to remove judicial blinders so as to enable the court to see things as they really are." Id., 281. Thus, "where the economic enterprise is one, the corporate forms being largely paper arrangements that do not reflect the business realities, the court should deal with the realities." Id. That case is neither controlling on us nor persuasive because here, unlike the facts of that case, the business reality is that Folio is not a paper arrangement but a separate and independently functioning corporation.

II

The commissioner's second claim is that, in light of developments in due process analysis and in the mail-order industry, the nexus requirement of the due pro-

cess clause is satisfied where an out-of-state corporation, such as Folio, has an "economic presence" in the state. This argument, at its roots, seeks to adopt the minimum contacts standard of personal jurisdiction analysis for state taxation on an out-of-state mail order company by dispelling the need for the company to have some physical connection[12] with the state beyond the use of the United States mail or a common carrier. We decline to adopt such an analysis.

The commissioner bases his argument on developments in due process case law for personal jurisdiction

[12] A review of Supreme Court case law in the area of state imposition of sales and use taxes demonstrates that some degree of physical presence, whether by the presence of a retail store, offices, local agents, solicitors, or local advertising, is constitutionally required to support such a burden: " 'Case law has established that a sufficient nexus is found to exist where local agents of the seller are present in the taxing state. *Felt & Tarant Manufacturing Co.* v. *Gallagher*, 306 U.S. 62, 59 S. Ct. 376, 83 L. Ed. 488 (1939); *General Trading Co.* v. *State Tax Commission of the State of Iowa*, 322 U.S. 335, 64 S. Ct. 1028, 88 L. Ed. 1309 (1944). A similar result has been reached where the seller has local retail stores which are present in the taxing state. *Nelson* v. *Sears, Roebuck & Co.*, 312 U.S. 359, 61 S. Ct. 586, 85 L. Ed. 888 (1941) . . . . And in *National Geographic Society* [v. *California Equalization Board*, 430 U.S. 551, 97 S. Ct. 1386, 51 L. Ed. 2d 631 (1977)], the presence in the taxing state of two offices which solicited advertisements and received the benefit of municipal protection (fire, police, etc.) was held a sufficient nexus.' " *Cally Curtis Co.* v. *Groppo*, 214 Conn. 292, 298-99, 572 A.2d 302 (1990) quoting *L.L. Bean, Inc.* v. *Department of Revenue*, 516 A.2d 820, 824-25 (Pa. Commw. 1986).

"In *Miller Brothers Co.* v. *Maryland*, [347 U.S. 340, 74 S. Ct. 535, 98 L. Ed. 744 (1954)] however, the United States Supreme Court held that Maryland 'could not constitutionally impose upon a Delaware seller an obligation to collect use taxes where the Delaware firm had no retail outlets or sales solicitors in Maryland, despite the presence of advertising in Maryland which resulted in substantial sales and the delivery of goods into Maryland by the seller using its own trucks and drivers.' *L.L. Bean, Inc.* v. *Department of Revenue*, supra, 825. Furthermore, in *National Bellas Hess, Inc.* v. *Department of Revenue*, [386 U.S. 753, 87 S. Ct. 1389, 18 L. Ed. 2d 505 (1967)] the United States Supreme Court found an insufficient nexus where the only contacts between the seller and the taxing state were through the United States mail or common carrier." *Cally Curtis Co.* v. *Groppo*, supra, 299.

purposes, claiming that because commercial activity in a state is often sufficient for a state to exert personal jurisdiction over an out-of-state company; *Asahi Metal Industry Co.* v. *Superior Court of California*, 480 U.S. 102, 112, 107 S. Ct. 1026, 94 L. Ed. 2d. 92 (1987); such contacts should be sufficient to support state taxation on an out-of-state mail order company whose only contacts with the state are through the United States mail and common carriers.[13] The commissioner ignores, however, the general principle that "[i]t is the nature of the state's action that determines the kind and degree of activity in the state necessary for satisfying the requirements of due process." *Travelers Health Assn.* v. *Virginia*, 339 U.S. 643, 653, 70 S. Ct. 927, 94 L. Ed. 1154 (1949) (Douglas, J., concurring); see also *Kulick* v. *Department of Revenue*, 624 P.2d 93, 97 (Or.

[13] The commissioner asserts that more recent case law has focused on the "totality [of circumstances] of the business activities in a particular state" in determining whether a nexus exists to support state taxation. The cases cited, however, do not support the commissioner's argument that minimum contacts or economic presence alone should be the applicable standard.

In *National Geographic Society* v. *California Board of Equalization*, 430 U.S. 551, 97 S. Ct. 1386, 51 L. Ed. 2d 631 (1977), the United States Supreme Court upheld the imposition of sales and use taxes where the corporation had present in the taxing state two offices that solicited advertisements and received the benefit of municipal protection. Likewise, in *Reader's Digest Assn.* v. *Mahin*, 44 Ill. 2d 354, 255 N.E.2d 458 (1970), the Illinois Supreme Court upheld the imposition of sales and use taxes because the corporation used local advertising and resident solicitors. In *Cooey-Bentz Co.* v. *Lindley*, 66 Ohio St. 2d 54, 419 N.E.2d 1087 (1981), the court cited advertising directed at Ohio residents, as well as deliveries, installations, and repairs made in Ohio by the defendant West Virginia retailer to justify applying a use tax. Lastly, in *Franklin Mint Co.* v. *Tully*, 94 App. Div. 2d 877, 463 N.Y.S.2d 566 (1983), aff'd, 61 N.Y.2d 980, 463 N.E.2d 621, 475 N.Y.S.2d 280 (1984), the corporation engaged in local advertising, as well as delivery, installation, and service of goods located in New York.

A review of these cases demonstrates that a degree of physical connection to the taxing state, beyond the use of the mails or common carrier, existed in each case. In this case, Folio did not engage in any local advertising or local delivery, servicing or installation as part of its own corporate activities.

1981). The degree of due process required for exercising personal jurisdiction is not necessarily the same as that required to justify a state tax on an out-of-state seller. *Kulick* v. *Department of Revenue*, supra.[14]

Indeed, in *National Bellas Hess, Inc.* v. *Department of Revenue*, supra, 758, the Supreme Court explicitly recognized that a "sharp distinction" exists "between mail order sellers with retail outlets, solicitors, or property within a State, and those who do no more than communicate with customers in the State by mail or common carrier as part of a general interstate business." The commissioner's claim ignores the interests of the commerce clause, specifically discussed in *National Bellas Hess, Inc.* v. *Department of Revenue*, supra, which provide that " 'state taxation falling on interstate commerce . . . can only be justified as designed to make such commerce bear a fair share of the cost of the local government whose protection it enjoys.' " Id., 756, quoting *Freeman* v. *Hewit*, 329 U.S. 249, 253, 67 S. Ct. 274, 91 L. Ed. 265 (1946). The commissioner's bald assertion that "Folio has purposely availed itself of the privilege of conducting activities in Connecticut, thus invoking the benefits and protection of its laws," fails to clarify *how* Folio is benefitted

[14] In *Kulick* v. *Department of Revenue*, 624 P.2d 93, 97 (Or. 1981), the Oregon Supreme Court analyzed the applicability of the minimum contacts standard to a case involving a challenge to the imposition of a tax on nonresident shareholders of a Subchapter S corporation. That court noted that "[w]hen [the assertion of personal] jurisdiction is challenged, the due process issue concerns not the nonresident's substantive obligation, which theoretically should be the same in whatever court tries the case, but rather the legitimacy of that state's putting the nonresident to the inconvenience, the possible procedural drawbacks, and the judgment of what is asserted to be an inappropriate forum. A tax law, by contrast, is addressed to a general class of persons on whom the state means to place the substantive obligation to contribute to its revenues. It is not at all clear that the 'contacts' that due process demands for the first purpose are identical with the 'nexus' required for the second."

by local government when its contacts to Connecticut are solely through the United States mail and common carriers. Compare *D.H. Holmes Co. Ltd.* v. *McNamara*, 486 U.S. 24, 108 S. Ct. 1619, 100 L. Ed. 2d 21 (1988) (presence of retail stores in state); *National Geographic Society* v. *California Board of Equalization*, 430 U.S. 359, 97 S. Ct. 1386, 51 L. Ed 2d 631 (1977) (presence of two offices that solicited advertisements in state); *Scripto, Inc.* v. *Carson*, 362 U.S. 207, 80 S. Ct. 619, 4 L. Ed. 2d 660 (1959) (presence of solicitors in state).

The commissioner's argument that we should adopt an "economic presence" analysis in essence parallels the reasoning of the dissent in *National Bellas Hess, Inc.* v. *Department of Revenue*, supra. Justice Fortas argued that the imposition of the sales and use tax on the mail order company was proper, stating that "large-scale, systematic continuous solicitation and exploitation of the Illinois consumer market is a sufficient 'nexus' to require Bellas Hess to collect from Illinois customers . . . ." Id., 761. Furthermore, Justice Fortas would have found sufficient nexus to support the application of a tax where *National Bellas Hess, Inc.*, "regularly and continuously engaged in 'exploitation of the consumer market' . . . by soliciting residents of Illinois who live and work there and have homes and banking connections there . . . ." Id., 762. This view, however, has not been adopted by the Supreme Court, despite its recent review of the issue in *D.H. Holmes Co. Ltd.* v. *McNamara*, supra. In that case, the United States Supreme Court reaffirmed its adherence to *National Bellas Hess, Inc.*, and to the rule of constitutional law that a state may not collect sales and use taxes from a mail order company where its only contacts are through the mail or common carriers. We therefore reject the commissioner's claim that would have us dispense with the constitutional safeguards of

NO. CV 87-0338611 S
SFA FOLIO COLLECTIONS, INC. : SUPERIOR COURT
: JUDICIAL DISTRICT OF
v. HARTFORD-NEW BRITAIN
AT HARTFORD

TIMOTHY F. BANNON, COMMISSIONER : APRIL 2, 1990
OF DEPARTMENT OF REVENUE SERVICES
OF THE STATE OF CONNECTICUT

MEMORANDUM OF DECISION

The plaintiff SFA Folio Collections, Inc. (hereinafter Folio) appeals from decisions of the defendant Commissioner of the Department of Revenue Services (hereinafter Commissioner) assessing Folio with a sales and use tax liability of $234,450.28, including interest and penalty, and with a sales and use tax license fee of $20.00. Folio asserts that such assessments violate the Commerce Clause (Article I, Section 8, Clause 3) and the Due Process Clause (14th Amendment) of the United States Constitution.

The parties have stipulated to the following facts: Folio is a New York corporation having its principal place of business in Yonkers, New York. It engages in a mail order catalog business from its Yonkers location, selling high quality merchandise. Written or telephone purchase orders from persons throughout the United States, including Connecticut, are received in Yonkers and merchandise to fill the orders is shipped from Yonkers by common carrier or United States mail. Folio has no retail stores anywhere, and specifically in Connecticut does not have any store, office, distribution center or other facility, maintain any stock of goods or inventory, or employ any solicitors, canvassers or sales people. It has no Connecticut telephone directory

listing, retains no security interest in goods sold to Connecticut residents, does no credit investigation or collections in Connecticut, has no Connecticut bank accounts and does no repair or servicing of merchandise in Connecticut. It sent to Connecticut residents in 1986 649,000 catalogs and in 1987 733,000 catalogs, realizing sales revenues in those years in excess of $2,000,000.

Folio catalogs refer customers to its offices in Yonkers for customer assistance, merchandise return or exchange, and all other services.

Folio is a wholly-owned subsidiary of Saks and Company, a New York corporation with corporate headquarters in New York City. The Chairman and Chief Executive Officer of Saks and Company is a director of Folio and two other officers of Saks and Company are officers of Folio.

Saks Fifth Avenue of Stamford, Inc. (hereinafter Saks-Stamford) is a Connecticut corporation which operates a retail store in Stamford, Connecticut. It is also a wholly-owned subsidiary of Saks and Company and has some common officers and directors with Folio. The day-to-day operations of Saks-Stamford and Folio are each conducted by separate management groups and neither group makes decisions for the other corporation.

Saks-Stamford sells some merchandise identical to that sold by Folio. Folio customers can choose to use the tailoring services of Saks-Stamford, which services are available to anyone, and Folio customers are charged standard fees.

"SFA" (an abbreviation for Saks Fifth Avenue) and "Saks Fifth Avenue" are registered trademarks used in the Folio catalogs and the Saks-Stamford store, and Folio and Saks-

Stamford, along with all affiliates of Saks and Company, share a great variety of sales information, financial data and profit and loss statements.

In February 1987 a unit chief of the department of revenue services informed Folio that it was "engaged in business as described in Section 12-407(15) of the Connecticut Statutes. The unitary nexus established from your shared corporate name, logo, etc., with Saks Fifth Avenue-Stamford, Inc. is the basis of our position." Folio was asked to register with the department and charge a Connecticut sales tax on its sales to Connecticut residents. When Folio refused, on July 1, 1987 the Commissioner assessed a sales and use tax liability of $234,450, including penalty and interest to that date, and imposed a $20 sales and use tax license fee.[1] Folio petitioned for reassessment. The Commissioner denied Folio's petition on October 23, 1987 and Folio then appealed to this court pursuant to § 12-422.

The central question in this appeal is the precedential weight to be given to *National Bellas Hess v. Department of Revenue*, 386 U.S. 753 (1967). That case squarely holds that a state may not impose on an out-of-state mail order company the duty to collect a use tax on purchases by its residents when the company's only contact with the state's residents is by common carrier or the United States Mail. 386 U.S. at 758. See *D. H. Holmes Company, Ltd. v. McNamara*, 486 U.S. 24, 33 (1988). Folio relies on *National Bellas Hess* to sustain its appeal to the Commissioner's assessment of use taxes.

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[1]Since the assessment, General Statutes § 12-407(12) has been amended by Public Act 89-41 to define retailers subject to use taxes to include mail order businesses.

The Commissioner seeks to distinguish *National Bellas Hess* on the grounds that Folio has substantially more contacts with Connecticut than National Bellas Hess had with Illinois. He points to Folio sending 649,000 catalogs to Connecticut residents in 1986 and 733,000 in 1987, maintaining a toll-free "800" telephone number for Connecticut customers to place orders with Folio's Yonkers' office, shipping extra copies of its catalogs to Saks-Stamford, and Folio's customers getting tailoring services at Saks-Stamford. The tailoring service is made available by Saks-Stamford to all customers. Taking together, all of these contacts do not create the necessary nexus required by *National Bellas Hess.*

The Commissioner's main assertion is that the Saks-Stamford store is a retail outlet of Folio which brings the case within the ambit of *Nelson v. Sears, Roebuck & Co.,* 312 U.S. 359 (1941), *Nelson v. Montgomery Ward & Company, Inc.,* 312 U.S. 373 (1941), and *National Geographic Society v. California Board of Equalization,* 430 U.S. 551 (1977). In those cases, the mail order company maintained a retail store or office in the taxing state which the Court held entitled the state to require collection of use taxes on the company's mail order sales. In this case, however, Folio and Saks-Stamford are separate corporations. Although they have some common directors and officers, are affiliates of the same parent company, use the same trademarks and logos, sell similar merchandise and share financial and market information, they are distinct corporate entities. Saks-Stamford is not Folio's retail store, agent, instrumentality, or alter ego. The finding of the Commissioner's unit chief that Folio is engaged in business in Connecticut because a "unitary nexus" was established by its "shared corporate name, logo, etc., with Saks Fifth Avenue Stamford, Inc." has no basis in the evidence or in the law.

The Commissioner's second argument is that this Court should find the requisite nexus by reason of Folio's "economic presence" in Connecticut.[2] Recognizing that *National Bellas Hess* and its line of cases predicated the constitutional basis for imposition of state use taxes upon an out-of-state mail order company having some physical presence, either property, employees or agents in the state, the Commissioner points to recent Supreme Court cases finding "minimum contacts", not dependent on in-state physical presence, to justify *in personam* jurisdiction of corporations.

In *Burger King Corp. v. Rudzewicz*, 471 U.S. 462 (1985) the plaintiff Florida corporation sued in the Florida Federal District Court a Michigan resident for breach of a franchise contract entered into in Florida, governed by Florida law and requiring payment of all fees and forwarding of all notices to plaintiff's headquarters in Florida. The defendant attacked the court's *in personam* jurisdiction. In affirming the lower court's finding of jurisdiction, the Supreme Court

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[2]"Benefits from the taxing State, unrelated to physical contact with the State, may be of vastly greater significance than those derived from the presence of a whole swarm of drummers soliciting business. Practically speaking, it is hardly essential to the existence of a nexus with the taxing State that there must be personnel, directly engaged in some form of physical activity within the State in furtherance of a business purpose. The *connection between the taxing State and the out-of-state collector-seller to establish nexus should be an economic rather than a physical relationship. When the out-of-state seller takes advantage of the economic milieu within the taxing State for the purpose of realizing a profit, a sufficient nexus to require the seller to collect the use tax could be found.*"

P. Hartman, *Federal Limitations on State and Local Taxation*, 631 (1981) (emphasis added). See also Hartman, 39 Vand. L. Rev. at 1014.

quoted from its opinion in *World-Wide Volkswagen Corp. v. Woodson,* 444 U.S. 286, 297-98 (1980) that "[t]he forum State does not exceed its powers under the Due Process Clause if it asserts personal jurisdiction over a corporation that delivers its products into the stream of commerce with the expectation that they will be purchased by consumers in the forum State." It enunciated the rule that "the constitutional touchstone remains whether the defendant purposefully established 'minimum contacts' in the forum State." Where the defendant "deliberately" engaged in "significant activities within a State" (*Keeton v. Hustler Magazine, Inc.,* 465 U.S. 770, 781 (1984)) or "has created 'continuing obligations' between himself and residents of the forum" (*Travellers Health Association v. Virginia* (339 U.S. 643, 648 (1950)); . . . [j]urisdiction in these circumstances may not be avoided merely because the defendant did not *physically* enter the forum State . . . So long as a commercial actor's efforts are 'purposely directed' toward residents of another State, we have consistently rejected the notion that an absence of physical contacts can defeat personal jurisdiction there." (471 U.S. at 476). See also *Asahi Metal Industry Co., Ltd. v. Superior Court of California,* 480 U.S. 102 (1987).

In *Keeton v. Hustler Magazine, Inc.,* 465 U.S. 770, 773-74 (1984) the Court held, "Respondent's regular circulation of magazines in the forum State is sufficient to support an assertion of jurisdiction in a libel action based on the contents of the magazines."

The Commissioner asserts that by Folio flooding Connecticut with its catalogs (649,000 in 1986, 733,000 in 1987) to solicit sale of its products, and by realizing sales revenues of over $2,000,000, its activities are "purposely directed" toward Connecticut residents, within the meaning of *Burger*

King Corp., and a nexus is established. He then invokes the leading case of *Complete Auto Transit, Inc. v. Brady,* 430 U.S. 274 (1977) which holds that a State tax on an out-of-state corporation does not violate the Commerce Clause when "[1] the tax is applied to an activity with a substantial nexus with the taxing State, [2] is fairly apportioned, [3] does not discriminate against interstate commerce, and [4] is fairly related to the services provided by the State." Commissioner argues that if nexus with a state is adequate for due process purposes under the Fourteenth Amendment, it should be for taxing purposes under the Commerce Clause. See "Overturning Bellas Hess: Due Process Considerations." McCray, 1985 Brigham Young L. Rev. 265.

In this case the Connecticut use tax also meets the other prongs of the *Complete Auto* test. It is fairly apportioned because it provides a credit against it for sales taxes paid in other states (Conn. Gen. Stats. § 12-430(5)); it does not discriminate against interstate commerce because it is equal to the sales tax applicable to the same personal property purchased in-state. (*D. H. Holmes Company, Ltd. v. McNamara,* 406 U.S. 24 (1988)) and it is fairly related to services provided by Connecticut in that Connecticut provides the facilities and the "economic milieu" of a state that attracts Folio's upscale income customers, and the forum for enforcing Folio's legal rights against delinquent buyers. *Spiegel, Inc. v. FTC,* 540 F.2d 287 (7th Cir. 1976); see dissent in *National Bellas Hess,* 386 U.S. at 761-65; see also P. Hartman, infra, f. n. 1.

However, as persuasive as these arguments are, the Connecticut Supreme Court recently in *Cally Curtis Co. v. Groppo,* 214 Conn. 292 (1990) reaffirmed its allegiance to *National Bellas Hess. Cally Curtis* involved the issue of im-

posing a Connecticut use tax upon a California corporation which sold and rented training films to Connecticut residents, marketing them only by trade shows held outside of Connecticut and by sending catalogs through the mails. Orders for the film were accepted in California and deliveries and returns of films to and from Connecticut customers were made by common carrier or the United States mail. The Court held that "there was an insufficient nexus between *Curtis* and the state of Connecticut to subject *Curtis*, to the Connecticut use tax pursuant to General Statutes § 12-411." (214 Conn. at 301-2). The court found that *Curtis'* retention of title to the films it rented in Connecticut for three-day periods was de minimus and did not amount to holding property in the state. Relying strongly upon *National Bellas Hess*, it held that when a mail order corporation does not have property, agents, sales solicitors, retail stores, advertising offices, or local telephone listings, and does not advertise by radio, television, billboard or newspapers in a state, but communicates with customers in the state only by mail or common carrier, as part of a general interstate business, the corporation cannot constitutionally be required to collect that state's use tax.

This court finds the facts of *National Bellas Hess* and *Cally Curtis* indistinguishable from the facts of this case. Consequently, on the authority of those high court cases, this court is constrained to set aside the Commissioner's assessment of use taxes and license fees upon Folio. The appeal is sustained.

Robert Satter, J.

[Because of the length of the exhibits attached to this stipulation, none of the documents attached to this stipulation have been reproduced. The documents are on file in the clerk's office. (See P.B. sec. 4086)

NO. CV 87-0338611	
SFA FOLIO COLLECTIONS, INC.	SUPERIOR COURT
	JUDICIAL DISTRICT OF
v.	HARTFORD-NEW BRITAIN
	AT HARTFORD
TIMOTHY F. BANNON, COMMISSIONER OF DEPARTMENT OF REVENUE SERVICES OF THE STATE OF CONNECTICUT	February 2, 1989

STIPULATION OF FACTS

For purposes of the pending action only, it is stipulated by and between the parties, through their undersigned attorneys, that the following facts are admitted by the parties. No evidence of the facts set forth in this stipulation need be presented at trial. The parties further stipulate to the authenticity of the documents attached as exhibits hereto and made a part hereof and to the use of copies in lieu of originals for all purposes in this case.

The parties recognize that they have differing views as to the relevance of certain of the facts set forth below, even though the accuracy of those facts is not disputed. Accordingly, the parties specifically reserve the right to object to the relevance of any of the facts set forth in this stipulation.

I.

THE PARTIES

1. Plaintiff SFA Folio Collections, Inc. ("Folio") is a corporation organized and existing under the laws of the State of New York.

2. The officers and directors of Folio are located in New York City and Louisville, Kentucky.

3. Folio conducts a nationwide mail order business.

4. Folio is a wholly-owned subsidiary of Saks & Company ("Saks").

5. Folio's principal place of business is in Yonkers, New York.

6. Saks is a New York corporation with its corporate headquarters in New York City.

7. Defendant Timothy F. Bannon is the Commissioner of Revenue Services of the State of Connecticut ("the Commissioner"). He is responsible for the administration and enforcement of the Connecticut sales and use tax, Section 12-406 *et seq.* of Connecticut General States, Revision of 1949, as amended.

II.

FOLIO'S BUSINESS

8. Folio engages in mail order catalog sales from its principal place of business in Yonkers, New York. Written or telephone purchase orders from persons throughout the United States are received in Yonkers and merchandise is shipped therefrom by common carrier or U.S.

mail to fill these orders. Folio operates a tollfree "800" telephone number which its customers use to place their orders.

9. Folio has no retail stores anywhere.

10. Folio does not have, maintain, or physically use in Connecticut any store, office, distribution house, sales house, sample room, warehouse, other place of business, stock of goods, solicitor, canvasser, or sales person, at its direction, or with its permission. Folio has no written contract authorizing an agent or representative in Connecticut.

11. Folio neither owns nor leases real or personal property in Connecticut, but see paragraph 33.

12. Folio does not exhibit any goods or merchandise at leased space in Connecticut.

13. Folio stores no inventory or merchandise in Connecticut.

14. Folio has no offices in Connecticut.

15. Folio has no telephone service in Connecticut with local directory listings.

16. Folio is not qualified to do business in Connecticut.

17. Folio does not retain security interests in goods sold to Connecticut residents.

18. Folio does no credit investigations or collections in Connecticut.

19. Folio has no bank accounts in Connecticut.

20. Folio does not service or repair merchandise in Connecticut.

21. Folio sends mail order catalogs and flyers to Connecticut residents. In 1986, approximately 649,000 catalogs were sent to Connecticut residents. In 1987, approximately 733,000 catalogs were sent to Connecticut residents.

22. Folio has also contracted with companies such as Inserts, Inc., in Ridgefield, New Jersey, which places ads to sell catalogs several times a year in national fashion magazines such as Mademoiselle and Cosmopolitan. This company sells the mail order catalogs it advertises in these magazines.

23. Folio's catalogs are not designed, prepared, printed, published, or mailed from Connecticut.

24. Folio catalogs refer customers to its offices at 495 Tuckahoe Road, Yonkers, New York, for customer assistance, merchandise return or exchange, or other services. As a matter of policy, all customer service provided by Folio is provided at this location.

25. Customer inquiries and questions about orders are directed to Folio's offices in Yonkers, New York.

26. Customers pay for their orders by check or money order or by using their American Express, VISA, MasterCard, Saks Fifth Avenue, or Diners Club credit cards.

27. Folio's customers pay for shipping, handling, and transportation of mail order merchandise.

28. True and correct copies of Folio's catalogs are attached hereto as Exhibits 1-4 and are incorporated herein by reference.

29. "SFA" is an abbreviation for Saks Fifth Avenue. It is a federally registered tradename and trademark. It is part of Folio's corporate name and is used with the permission of Saks.

30. The name Saks Fifth Avenue has appeared in the Folio mail order catalog.

31. Saks Fifth Avenue and SFA are federally registered tradenames and trademarks. Their distinctive script designs are owned by the parent company, Saks & Company.

32. The Saks Fifth Avenue and SFA trademarks have traditionally signified high quality merchandise and service. To the extent that a Connecticut consumer associates these trademarks with Folio, Folio's business is benefitted.

33. Extra copies of certain Folio mail order catalogs are shipped by printers outside Connecticut via common carrier to the General Manager of the Saks Fifth Avenue store in Stamford for store employees to use as reference guides, to inform employees of fashion trends, and for merchandise education.

34. The credit department of Saks & Company includes advertising pieces, called "bill inserts," in the same envelope as charge account statements sent to customers. These bill inserts contain the toll-free number of Folio. To the extent any sales are generated from customers who receive bill inserts, the sales are filled by Folio. Folio pays the cost of the customer return envelope for the billing statement.

35. Tailoring services are available at the Saks Fifth Avenue-Stamford store. Folio customers who choose to

use the tailoring services are charged the standard fees by the store. These tailoring services are available at Saks Fifth Avenue stores to anyone as are other repair services, such as jewelry or watch repair.

36. All general merchants sell common goods at retail. A consumer may purchase the same brand name merchandise in a number and variety of different retail stores throughout the United States. The Saks Fifth Avenue store in Stamford sells some merchandise identical to that sold by Folio. Some merchandise in Folio's catalogs can be purchased from Connecticut retailers not affiliated in any way with Saks & Company.

37. Folio and Saks & Company share the following common director and officers:

Melvin Jacobs	– Chairman and Chief Executive Officer of Saks & Company Director of Folio
Joan F. Krey	– Vice President, General Counsel and Secretary of Saks Company Vice President and Assistant Secretary of Folio
Thomas F. D'Angelo	– Assistant Secretary of Saks & Company Vice President and Assistant Secretary of Folio

38. The attached Exhibit 5 lists common officers and directors of SFA Folio Collections, Inc. and Saks Fifth Avenue of Stamford, Inc. These officers and directors serve as representatives of the shareholders' interest, and are involved primarily in the financial oversight and gen-

eral protection of corporate interests. Responsibility for managing the day-to-day operations of both SFA Folio Collections, Inc., and Saks Fifth Avenue of Stamford, Inc., has been delegated to a separate management group in each corporation. None of the management group of SFA Folio Collections, Inc., makes any decisions for Saks Fifth Avenue of Stamford, Inc. None of the management group of Saks Fifth Avenue of Stamford, Inc., makes decisions for SFA Folio Collections, Inc.

39. All Saks Fifth Avenue retail stores and Folio share a great variety of daily sales data, monthly sales summaries, and sales and inventory levels by category and type of merchandise. They also share financial data and profit and loss statements.

40. From time to time, Folio may need to contact its Connecticut customers if their order forms are incomplete or incorrect. If additional information is needed to process a customer return or to make an adjustment, one of Folio's employees will call or write the customer.

41. A true and correct copy of the January 13, 1989 deposition of Joan F. Krey is attached hereto as Exhibit 6 and is incorporated herein by reference.

III.

CONNECTICUT USE TAX

42. Because it does not have employees, offices, or business locations in Connecticut, Folio never applied for and does not have a permit to collect use tax under Conn. Gen. Stat. § 12-409. It does not collect Connecticut use tax on its catalog sales to Connecticut residents.

43. On February 25, 1987, Joseph Thomas, a unit chief employed by the then Commissioner of Revenue Services John C. Groppo and acting under the direction and control of the Commissioner, informed Folio that it ". . . meets the definition of 'engaged in business in the state' as described in Section 12-407(15) of the Connecticut statutes. The unitary nexus established from your shared corporate name, logo, etc., with Saks Fifth Avenue-Stamford, Inc. is the basis of our position." Folio was asked to register with the Department and ". . . to charge appropriate sales tax . . ." on its sales to Connecticut residents.

44. Folio informed Commissioner Groppo that the imposition of a duty upon it to register under General Statute Section 12-411(8) was an invalid and unconstitutional application of Connecticut law and that he was without jurisdiction over Folio.

45. The Commissioner's reference to "Saks Fifth Avenue-Stamford, Inc." was to a separate Connecticut corporation. It is wholly-owned by Saks & Company. Saks Fifth Avenue-Stamford, Inc.'s only business is to run a retail store in Stamford, Connecticut.

46. On June 18, 1987, the Commissioner notified Folio that ". . . its registration application has been recently processed and the tax registration number . . ." 4920252-000 had been assigned to Folio. Folio never applied for a tax registration number.

47. On June 11, 1987, the Commissioner notified Folio that an assessment would be issued to it.

48. On July 1, 1987, the Commissioner sent a statement to Folio assessing sales and use tax liability in the

amount of $163,052.71, plus interest in the amount of $55,072.25 and a penalty of $16,305.32, for a total assessment at that time of $234,450.28.

49. On October 1, 1987, the Commissioner issued to Folio an assessment for a $20 sales and use tax license and permit.

IV.

ADMINISTRATIVE APPEAL

50. Pursuant to Connecticut General Statutes, Section 12-421, Folio filed its petition for reassessment with the Commissioner on July 30, 1987, citing to the Commissioner that it was not "engaged in business" in Connecticut as defined by Connecticut General Statutes, Section 12-407(15).

51. Folio also contended that it was not required to register with the Department of Revenue Services or to obtain a permit under Connecticut General Statute Ann., Section 12-409 because it was not engaged in or conducting business in Connecticut. Neither was Folio required to collect or liable for Connecticut sales and use taxes on its mail order sales to Connecticut customers.

52. Folio argued that the assessments purported to impose the duty of registration and of use tax collection upon it in violation of Connecticut law and United States constitutional provisions.

53. After consideration of Folio's appeal, the Commissioner denied it and confirmed the assessments on October 23, 1987.

54. Folio appealed to the Superior Court on November 20, 1987, pursuant to Connecticut General Statutes, Section 12-422.

55. The stipulated facts contained herein are to be used in the determination of Counts 1 and 3 of the complaint dated November 20, 1987, by the trial court. Pursuant to Practice Book § 4002, the parties consent that the determination of the issues involved in Counts 1 and 3 are of such significance to the determination of the outcome of the case, that the delay incident to appeal, with regard to Count 2 of the complaint, would be justified. The parties therefore consent to judgment being entered by the trial court on Counts 1 and 3 for the purpose of an immediate appeal pursuant to Practice Book § 4002 on those counts by the aggrieved party.

Count 2 of the complaint concerns the proper amount of tax and the proper amount of taxable sales. The parties stipulate that, if tax is due herein, this issue shall be remanded to the Department of Revenue Services for calculation of these amounts upon audit.

Respectfully submitted,

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5230T

BLOOMINGDALE'S BY MAIL, LTD.	IN THE CHANCERY COURT FOR
	THE STATE OF TENNESSEE
VS. NO 89-3017-II	
	TWENTIETH JUDICIAL DISTRICT
JOE B. HUDDLESTON, COMMISSIONER	DAVIDSON COUNTY, PART II

MEMORANDUM

This is an action for declaratory judgment and injunctive relief against the State's attempt to impose and enforce liability and use tax collection obligations on the plaintiff under the Tennessee statutes covering out-of-state mail-order companies.

Plaintiff claims it has no place of business, no property, and no employees in Tennessee, and therefore, no actual nexus or connection with the State. Plaintiff argues that the burden of collection unconstitutionally imposes a restraint upon interstate commerce and violates due process.

In particular, plaintiff relies on the decision in *National Bellas Hess, Inc. v. Illinois,* 386 U.S. 753, 87 S.Ct 1389, 18 L.Ed. 2d 505 (1967).

In determining whether a state tax complies with constitutional due process requirements, the controlling question is "whether the state has given anything for which it can ask return." *Bellas Hess,* 386 U.S. at 756. With regard to restraint on interstate commerce, the United States Supreme Court held that "state taxation falling on interstate commerce . . . can only be justified as designed to make such commerce bear a fair share of the cost of the local government whose protection it enjoys." *id.* Accordingly,

when examining the constitutionality of imposing the duty of collection of the use tax upon an out-of-state seller, the relevant legal inquiry is whether there exists "some definite link, some minimum connection, between a state and the person, property or transaction it seeks to tax." The existence of such a link or nexus will thus turn upon the individual facts of each case. *L. L. Bean, Inc. v. Pennsylvania Department of Revenue,* 516 A. 2d 820 (1986).

Plaintiff has moved for summary judgment on the basis there are no issues of disputed fact. The summary judgment motion was heard on a stipulation and upon affidavits and depositions in support of and in opposition to the motion. Plaintiff has objected to affidavits filed by the defendant. The Court will first make a ruling on the objections.

The affidavit of Holly Ulrich, a professor of economics, as to changes in the mail order industry was objected to as irrelevant and hearsay. The affidavit presents the witness as a qualified expert in the field of economics. Attached to the affidavit is an unpublished paper entitled "Changes in the Mail Order Industry Since 1967." The affiant, as author of that paper, sets forth opinions and conclusions based on sources usually relied upon by expert in the field of economics.

This evidence is admissible under T.R.E. 702 and 703 and does have some relevance to this controversy.

The affidavit of Matthew N. Murray, a professor or economics, is objected to on the grounds of relevance and hearsay. Murray has also been qualified as an expert in economics and the evidence is also admissible under T.R.E. 702 and 703. The economic effect that plaintiff and other

mail order companies have on Tennessee has relevance to this case.

The affidavit of L. Eldridge concerning the weight of catalogs sent by plaintiff through the mail into Tennessee is objected to as irrelevant. This evidence is relevant to show that approximate amount of garbage the plaintiff regularly sends to Tennessee and the local government must dispose of.

The affidavit of Ray Westphal concerning modern computer use in computing taxes is objected to as irrelevant. One of the issues is the burden imposed on plaintiff in collecting taxes. The objection is overruled.

The part of the affidavit of Evelyn T. Gander that submits advertisements of Bloomingdale's, Inc., a separate corporation not a party in this case, is irrelevant and the objection is sustained.

The affidavit of May E. Bennett submitting defendants catalogs she received in Tennessee appears to have some relevancy and the objection is overruled.

Plaintiff objects to the affidavit of Charles L. Lewis as irrelevant. Plaintiff has admitted that it is within the precise scope of the mail order tax statute, T.C.A. § 67-6-102(6)(J), therefore, Mr. Lewis' affidavit is inadmissible.

Plaintiff also objects to portions of the deposition of Robert Vanmeter, plaintiff's chief financial officer, as set forth in the motion. The relevancy objections are overruled.

The State claims the mail order business today is vastly different from that in 1967, therefore providing nexus in this case that did not exist in *Bellas Hess*.

In the 1960's, the mail order business amounted to approximately $2.4 billion per year. By 1989 it increased to an estimated $183 billion.

Plaintiff solicits sales from Tennessee residents by the distribution of catalogs in a regular and systematic basis. Annually plaintiff distributes at least 25 different types of catalogs. From January to June of 1989, plaintiff distributed approximately 350,000 catalogs to Tennessee residents. The catalogs provide the customer a toll free number for placing orders or asking questions. Plaintiff accepts orders by mail order forms with payment by check, money order or credit card. Placing orders by telephone is the most frequently used method with payment by credit card.

At the time of the *Bellas Hess* decision, the necessity of a national company complying with combined local and state tax rates in several jurisdictions might have imposed a significant burden on interstate commerce. Those concerns have disappeared because of the capability of modern computers. In addition, Tennessee provides a dealer with the option of paying a uniform local rate. Therefore, the dealer selling to Tennessee residents need be concerned with only one tax rate for all of Tennessee.

The 350,000 catalogs shipped to Tennessee during six months from January to June of 1989 were printed on slick, non-recyclable paper. This requires local government to take on the burden of placing this garbage in landfills.

Plaintiff's sales catalog states that the merchandise ordered may be returned for replacement, credit or refund. This amounts to a "sale on approval" in which the goods remain the property of the seller until accepted by the buyer. Under this arrangement, title and risk of loss remains

with the plaintiff until acceptance. Thus, plaintiff has a considerable amount of property in Tennessee that requires local governments' protection from fire and theft.

If the *Bellas Hess* decision relied on the principle that exclusively interstate commerce is immune from state taxation, that principle was rejected in *Complete Auto Transit v. Brady,* 430 U.S. 274, 97 S.Ct. 1076, 51 L.Ed. 326 (1977).

In that case, the Supreme Court held that interstate commerce is required to pay its fair share of state taxes. The Court held a state sales tax on interstate commerce is valid if it satisfies a four prong test. The statutes in question satisfy that test.

It is not necessary to show the taxpayer has a "physical presence" in the taxing state in order to satisfy due process. In more recent years, the nexus test has been whether there is a minimal connection between the interstate activity and the taxing state. See *National Geographic v. California Equalization Board,* 430 U.S. 551, 97 S.Ct 1386, 51 L.Ed 631 (1977). The essence of the due process clause is to insure fundamental fairness.

In the case of out-of-state retailers enjoying large volumes of sales from the Tennessee marketplace, it is only fair and just for those retailers to collect taxes comparable to those collected by their local competitors.

The Court has, therefore, concluded that T.C.A. § 67-6-102(4)(J) and § 67-6-102(6)(J) area constitutional, and the State is entitled to a summary judgment.

General Lewis should prepare an order in accordance with this Memorandum.

C. ALLEN HIGH, CHANCELLOR

March 8, 1991
cc: Charles L. Lewis
Joe C. Peal
Maryann B. Gall
Joseph W. Gibbs

SFA FOLIO COLLECTIONS, INC.	IN THE CHANCERY COURT
VS. No. 89-3015-III	FOR THE STATE OF TENNESSEE
JOE B. HUDDLESTON, in his capacity as Commissioner of Revenue of the State of Tennessee	20TH JUDICIAL DISTRICT
	DAVIDSON COUNTY
	PART THREE

MEMORANDUM

This tax case is before the court on the plaintiff's motion for summary judgment. The principal question presented is whether the defendant Commissioner of Revenue's use tax assessment on the plaintiff's mail order sales to Tennessee residents violates the due process and commerce clauses of the United States Constitution. U.S. Const. art. 1, §8, cl. 3; amend. IV, §1.

The plaintiff SFA Folio Collections, Inc. is a New York State based mail order company that makes nationwide catalog sales, including sales to Tennessee residents. Orders and customer inquiries are directed to Folio's offices in

Yonkers, New York by mail and by a toll-free 800 telephone number. Merchandise is shipped directly to Tennessee customers from Yonkers, and all returns are directed there.

In June 1989, the Tennessee Department of Revenue notified Folio that it must register as a dealer for the purpose of collecting Tennessee use taxes under T.C.A. § 67-6-102(4)(J). A dealer includes any person who "[e]ngages in the regular or systematic solicitation of a consumer market in this state by the distribution of catalogs, periodicals, advertising fliers, or other advertising, or by means of print, radio or television media, by telegraphy, telephone, computer data base, cable, optic, microwave, or other communication system." In August 1989, the Department issued an assessment against Folio for the period January 1989 through June 1989.[1]

Folio argues in support of its motion that there are no contested facts and that T.C.A. § 67-6-102(6)(J) is unconstitutional, both facially and as applied to Folio. It contends that its only connection with Tennessee consists of communication with the state's residents via interstate commerce and therefore it lacks sufficient nexus with Tennessee to obligate it to collect state use tax.

Folio relies on the 1967 United States Supreme Court decision, *National Bellas Hess, Inc. v. Department of Revenue*, 386 U.S. 753. In *Bellas Hess* the Court rejected an Illinois tax on mail order sales by an out-of-state company whose sole link with Illinois was through communication with residents by mail or common carrier. The Court held that in

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[1]The amount of the assessment was later reduced from $38,800 to $22,760.

light of due process of law and commerce clause requirements, such a link was not sufficient to justify state tax on the sales.

While the *Bellas Hess* case is instructive, it does not provide a complete answer to the present case. First, decisions in cases dealing with taxation on interstate commerce, including *Bellas Hess,* must be decided on their own peculiar facts. "Prohibited discriminatory burdens on interstate commerce are not to be determined by abstractions. Particular facts of specific cases determine whether a given tax prohibitively discriminates against interstate commerce." *Nelson v. Sears, Roebuck and Co.,* 312 U.S. 359, 366 (1941). This requires review of the totality of the out-of-state seller's activities within the taxing state. *See National Geographic society v. California board of Equalization,* 430 U.S. 551 (1977).

Second, the Court must consider the case in light of economic reality. *See Complete Auto Transit, Inc. v. Brady,* 430 U.S. 274, 284 (1977). The technological and market-related changes since *Bellas Hess* cannot be ignored.

For Folio's commerce clause and due process of law claims, the controlling question is one of fairness – to the State as well as to Folio. While the commerce clause protects interstate commerce from unjustifiable local entanglements, a state may still require that interstate commerce bear a fair share of the cost of the local government whose protections it enjoys. *Bellas Hess,* 386 U.S. at 756. similarly, for due process of law, the issue is "whether the state has given anything for which it can ask return." *Id.* (citation omitted).

Folio repeatedly contacts Tennessee residents by mailing catalogs into Tennessee. The responsibility to dispose of

these catalogs falls upon Tennessee governments. Folio's frequent targeting of Tennessee residents must mean it has found Tennessee to be a fruitful marketplace. Fairness requires that it help pay for the cleanup in the aftermath of its frequent sales campaigns.

In Folio's marketing strategy customer satisfaction is central. Each catalog states in its order form:

"Satisfaction is guaranteed. If you are not satisfied, you may return your purchase for replacement credit or refund."[2] Until the buyer in Tennessee is satisfied with an order and the sale becomes final, Folio has an interest in goods that have come to rest in Tennessee. During that time, the laws of this state apply to these goods as to any other property within the state and protect Folio's interest. These laws permit a business like Folio to ship merchandise into Tennessee for customer inspection with the expectation that it will either profit from a sale or have its merchandise safely returned. Requiring Folio to bear some of the expense of this protection by collecting use tax is a fair demand.

No violation of the commerce clause results from imposing this duty. A major factor in the decision in *Bellas Hess* voiding collection of the Illinois use tax by an out-of-state mail order house was the unjustifiable entanglement of interstate commerce that would result if mail order businesses had to compute taxes from numerous local jurisdictions. 386 U.S. at 759-760. With the advantage in

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[2]Folio objects to the introduction into evidence of its own catalogs, asserting that they are "unauthenticated" and noting that they are not for the tax years in question. Significantly, Folio does not contend that the catalogs in the record are materially different from those from the tax years in dispute.

automation made since 1967, that holding in *Bellas Hess* is no longer valid. *See* Hartman, *Collection of the Use Tax on Out-of-State Mail-Order Sales,* 39 Vand. L. Rev. 993 (1986). Considering the technological support that Folio must use to operate an extensive and complicated mail order business, the collection of Tennessee use tax should not longer cause the problems feared in *Bellas Hess.*

The Court finds no violation of Folio's constitutional rights by the enforcement of T.C.A. § 67-6-102(6)(3). Folio's motion for summary judgment is denied.

ROBERT S. BRANDT
Chancellor

March 11, 1991
cc: Joseph Gibbs
Maryann B. Gall
Charles L. Lewis

IN THE CHANCERY COURT FOR THE STATE OF TENNESSEE
20TH JUDICIAL DISTRICT, DAVIDSON COUNTY,
PART THREE

SFA FOLIO COLLECTIONS, INC.	
VS.	
	No. 89-3015-III
JOE B. HUDDLESTON, in his capacity as Commissioner of Revenue of the State of Tennessee	

ORDER

For the reasons stated in the Court's Memorandum, the plaintiff's motion for summary judgment is denied.

ROBERT B. BRANDT
CHANCELLOR

March 11, 1991
cc: Joseph Gibbs
Maryann B. Gall
Charles L. Lewis

STATE OF NORTH DAKOTA
COUNTY OF BURLEIGH

IN DISTRICT COURT
SOUTH CENTRAL JUDICIAL DISTRICT

STATE OF NORTH DAKOTA, BY AND THROUGH ITS TAX COMMISSIONER, HEIDI HEITKAMP, Plaintiff,	CIVIL NO. 41677
- v. -	MEMORANDUM OPINION
QUILL CORPORATION, Defendant.	

This action brought by the State of North Dakota seeks to have the Quill Corporation declared a "retailer" for purposes of applying the North Dakota Sales and Use Tax on the distribution of Quill's products in our state. The Answer of Quill admits most of the facts alleged by the State, but specifically denies they are required to obtain a certificate of authority to do business in our state or that they are liable to remit a use tax on the products sold here. They specifically claim that the Tax Commissioner is acting in violation of the commerce clause of the United States Constitution.

The basis for taxation of products in North Dakota is Section 57-40.2-01(6) which amended the definition of "retailer" in 1987 to read as follows:

> "A retailer also includes every person who engages in regular or systematic solicitation of a consumer market in this state by the distribution of catalogs, periodicals, advertising fliers or other advertising, or by means of print, radio or television media, telegraphy, telephone, computer data base, cable, optic, microwave, or other communication system."

The facts of this matter show that Quill is a Delaware Corporation with its principal place of business in Illinois, with additional offices and warehouses in California. Quill solicits sales of merchanidse through catalogs and advertising flyers mailed to customers throughout North Dakota from locations outside of North Dakota. Quill does not maintain any office, distribution house, sales house, warehouse or any other place of business in North Dakota; it does not have any agent, salesmen, or other type of representative to sell or take orders, to deliver merchandise, to accept payments or to service merchandise it sells here; it does not have any telephone listing or toll free telephone line, and does not advertise by any radio or television media in North Dakota; It does not advertise in any newspapers distributed in North Dakota, nor solicit business in any fashion other than by catalog or flyer. All of the business conducted in North Dakota is done by United States mail, telephone or common carrier.

The point at which the parties depart in their interpretation of the facts is whether Quill has any real or personal tangible property in the State of North Dakota. The argument advanced by the state is that since Quill sells all of its items with an unequivocal ninety day guarantee, Quill remains the owner of such property until this approval period expires. Quill, on the other hand, claims that title passes at the time the property is shipped from their outlets in Illinois or California.

It seems clear to the Court that the case of *Hess v. Illinois*, 386 US 753 (1967) prohibits this type of legislation. In *Hess*, the facts are very similar to those found in this case. Hess was a mail order house with its principal place of business in Missouri. Its sales to Illinois residents were substantial.

Hess's manner of doing business in Illinois was similar to that of Quill in this case. The Supreme Court of the United States ultimately stated that there was insufficient nexus with the Hess Corporation to tax the sales that were taking place through the use of the mails.

In attempting to differentiate itself from that decision, the State, in this case, has chosen to identify the ninety-day guarantee as a "sale on approval". This argument has been advanced in numerous other states without success, and the Court finds no reason to adopt that theory here. I am satisfied that title changes hands at the time of the mailing, and that the risk on the items sold in this manner fall upon the purchaser in North Dakota at the time they receive the property, and not ninety days later as the state suggests.

Many of the arguments made by the State in this case are merely restatements of the remarks made by Mr. Justice Fortas in the *Hess* case. His dissent very logically sets forth reasons why *Hess* should have been taxed in Illinois, but the Supreme Court in that case failed to adopt his arguments. Although I find the arguments quite persuasive, this is not the law of the United States nor of the State of North Dakota.

Hess does, however, set forth the rationale for state taxation on interstate commerce. These concepts are set forth in the decision and read as follows:

> "State taxation falling on interstate commerce . . . can only be justified as designed to make such commerce bear a fair share of the cost of a local government whose protection it enjoys. . . . And in determining whether a state tax falls within the confines of the Due Process Clause, the Court has said that the simple but controlling question is whether the state has given anything for which it can ask return." See *Hess* at page 756.

Rather than dwell on the intricacies of title passing as the State has done in this case, they should have been presenting facts to the Court showing that the State of North Dakota spends funds for the protection and benefit of the mail order business. By doing so, they could show that taxation was not only for the benefit of local residents, but for the benefit of the mail order houses. Until these facts can be obtained, there is no nexus to allow the state to define retailer in the manner it chose. The mere fact that this appears to be unfair to the local retrailers cannot be a determining factor in this case. The focus must be on the beneficiary of the taxes as opposed to the consequences. Until this can be established, it would appear that the tax dollars spent protects the local resident and does not benefit the out of state mail order business in any significant manner.

The State, during argument, urged that the reasoning of *Goldberg v. Sweet,* 488 US ____ 102 LEd 2d 607, 109 S Ct 582 (1989), extends the taxing arm of the State to Quill. However, the primary difference in that case is that the parties stipulated Illinois had a substantial nexus with the interstate telecommunications reached by the Tax Act. That is precisely the issue in controversy in this case, and on which I fail to find any presence (nexus) of Quill in North Dakota.

Based on the foregoing, the language heretofore quoted in Section 57-40.2-01(6) and that found in subsection 7 is declared to be in violation of the United States Constitution and accordingly declared invalid as applied to Quill.

Counsel for the defendant may prepare the appropriate Order for Summary Judgment granting relief to them. The Court does not grant attorney's fees to the defendant, but only costs.

Dated: May 15, 1990

At Bismarck, North Dakota

BY THE COURT:

Benny A. Graff, District Judge

CONN. GEN. STAT. § 12-422

Appeal. Any taxpayer aggrieved because of any order, decision, determination or disallowance of the commissioner of revenue services under section 12-418, 12-421 or 12-425 may, within one month after service upon the taxpayer of notice of such order, decision, determination or disallowance, take an appeal therefrom to the superior court for the judicial district of Hartford-New Britain*, which shall be accompanied by a citation to the commissioner of revenue services to appear before said court. Such citation shall be signed by the same authority, and such appeal shall be returnable at the same time and served and returned in the same manner, as is required in case of a summons in a civil action. The authority issuing the citation shall take from the appellant a bond or recognizance to the state of Connecticut, with surety to prosecute the appeal to effect and to comply with the orders and decrees of the court in the premises. Such appeals shall be preferred cases, to be heard, unless cause appears to the contrary, at the first session, by the court or by a committee appointed by it. Said court may grant such relief as may be equitable and, if such tax has been paid prior to the granting of such relief, may order the treasurer to pay the amount of such relief, with interest at the rate of six per cent per annum, to the aggrieved taxpayer. If the appeal has been taken without probable cause, the court may tax double or triple costs, as the case demands; and, upon all such appeals which are denied, costs may be taxed against the appellant at the discretion of the court, but no costs shall be taxed against the state.